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2707
No. 13051

**United States
Court of Appeals**
for the Ninth Circuit.

OREGON-WASHINGTON BRIDGE COMPANY,
a Corporation,

Appellant,

vs.

TUG "LEW RUSSELL, SR.," and CRANE
BARGE No. 25, RUSSELL FAMILY, INC.,
RUSSELL TOWBOAT AND MOORAGE
COMPANY,

Appellees.

Apostles on Appeal

Appeal from the United States District Court for the
District of Oregon

FILED

OCT 22 1951

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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WILLIAM F. WHITE,

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Portland, Oregon,

Attorneys for Appellees.

In the District Court of the United States for the
District of Oregon

In Admiralty Civil No. 5749

OREGON-WASHINGTON BRIDGE COMPANY,
Libelant,

vs.

TUG "LEW RUSSELL, SR." and CRANE
BARGE No. 25, in Rem,

and

RUSSELL TOWBOAT AND MOORAGE COM-
PANY, Owner of Said Tug and Barge,
Respondents.

LIBEL IN REM AND IN PERSONAM

To the Honorable James Alger Fee, the Honorable
Claude McColloch and the Honorable Gus J.
Solomon, Judges of the Above-Entitled Court:

The libel of Oregon-Washington Bridge Company,
a corporation, against the Tug "Lew Russell, Sr.,"
and the Crane Barge No. 25, their tackle, apparel,
furniture, etc., against Russell Towboat and Moor-
age Compny, a corporation, owner of said Tug and
Barge, and against all persons intervening for their
interests therein, in a cause of action for damages,
civil and maritime, alleges upon information and
belief as follows:

Article I.

That libelant is a corporation duly organized and
existing under and by virtue of the laws of the State

of Washington having a principal place of business at Olympia, Washington, and owning and operating a highway bridge across the Columbia River near the town of Hood River, Oregon, known as the Hood River-White Salmon Bridge.

Article II.

That respondent, Russell Towboat and Moorage Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and having a principal place of business at Portland, Multnomah County, Oregon; that at the times herein mentioned said respondent was the owner and operator of the Tug "Lew Russell, Sr.," and the Crane Barge No. 25.

Article III.

That at and prior to 11:30 a.m. on June 13, 1950, respondent, Russell Towboat and Moorage Company, was moving said Tug "Lew Russell, Sr." upstream or easterly on the Columbia River with the Crane Barge No. 25 carrying a Whirley Crane in tow when said equipment ran into and against the Hood River-White Salmon Bridge owned and operated by libelant, striking the lift span of said bridge, tearing out a large section of the railing, entirely shearing off one vertical member and buckling another and badly distorting two of the large horizontal braces, damaging the electrical installation, the railing and the tool house on said bridge and so weakening and damaging said bridge that it was not capable of handling trucks and trailers or heavy

traffic; necessitating temporary emergency repairs in the amount of \$3,811.18 and further repairs at the estimated cost of \$23,710.00, and causing loss of revenue from the use of said bridge in the amount of \$3,100.00 and damaging libelant and libelant's said property to an extent which libelant alleges on information and belief to be equal to or exceed the sum of \$30,621.18.

Article IV.

That the damage to libelant and libelant's said property was caused by the carelessness, recklessness and negligence of the respondent and the pilot, master, officers and crew of the tug in the following respect, among others:

1. In failing to maintain a proper or any look-out;
2. In proceeding at a high, dangerous and reckless speed under the circumstances;
3. In failing to keep said tug and crane under proper or any control;
4. In failing to lower the derrick boom so that it would pass under the draw of the bridge.

Article V.

That said Tug "Lew Russell, Sr." and the Derrick Barge No. 25 are now or will be during the pendency of process hereunder within this district and within the jurisdiction of this Honorable Court.

Article VI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays:

1. That a process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against Crane Barge No. 25 and the tug "Lew Russell, Sr.," its engines, boilers, etc.;

2. That all persons claiming any interest therein may be required to appear and answer on oath all and singular the matters aforesaid;

3. That libelant may have a decree for its damages with interest and costs;

4. That said tug "Lew Russell, Sr.," and said Crane Barge No. 25 may be condemned and sold to satisfy the damages of the libelant herein;

5. That process in due form of law according to the practice of this Honorable Court may issue against the respondent, Russell Towboat and Moorage Company, citing it to appear and answer on oath the matters and things aforesaid;

6. That this Honorable Court may adjudge and decree that the respondent, Russell Towboat and Moorage Company, pay to the libelant its damages as aforesaid with interests and costs, and

7. That the court will grant to the libelant such

other and further relief as the justice of the cause may require.

/s/ H. LAWRENCE LISTER,

GRAY & LISTER,

Proctors for Libelant.

State of Oregon,

County of Multnomah—ss.

I, H. Lawrence Lister, of proctors for libelant, certify that the within libel is true to the best of my knowledge, information and belief. I make this verification for the reason that none of the officers of the libelant are within the district; and I have familiarized myself with the facts.

/s/ H. LAWRENCE LISTER.

Subscribed and sworn to before me this 11th day of September, 1950.

[Seal] /s/ WENDELL GRAY,

Notary Public for Oregon.

My commission expires Jan. 14, 1951.

[Endorsed]: Filed Sept. 11, 1950.

Title of District Court and Cause.]

LIBELANT'S STIPULATION FOR COSTS

Whereas, a libel was filed in this Court on the 11th day of September, 1950, by the above-named libelant against the above-named respondent for

reasons and causes in said libel mentioned and the said libelant and Fireman's Fund Indemnity Company, a corporation of the State of California, authorized to transact surety business in the State of Oregon, parties hereto, hereby consent and agree that in case of default or a contumacy on the part of said libelant or their surety, execution may issue against their goods, chattels and lands for the sum of \$250.00.

Now, Therefore, It is hereby stipulated and agreed for the benefit of whom it may concern that the undersigned shall be, and each of them is, bound in the sum of \$250.00, conditioned that libelant above named shall pay all costs and charges that may be awarded against it in any decree of this Court or in case of appeal, by the Appellate Court.

Dated this 11th day of September, 1950.

OREGON-WASHINGTON
BRIDGE COMPANY,

By /s/ H. LAWRENCE LISTER,
Proctor.

FIREMAN'S FUND
INDEMNITY COMPANY,

By /s/ GEORGE J. CAMPBELL,
Attorney-in-Fact.

[Endorsed]: Filed Sept. 11, 1950.

[Title of District Court and Cause.]

CLAIMS OF OWNERS

Russell Towboat & Moorage Co., owner of the tug
Lew Russell, Sr., and Russell Family, Inc., owner
of Crane Barge No. 25, appear before this Honor-
able Court and respectively claim said tug and
barge, and pray leave to defend this suit accordingly.

RUSSELL TOWBOAT &
MOORAGE CO.,

By /s/ LEW S. RUSSELL, JR.,
President.

RUSSELL FAMILY, INC.,

By /s/ LEW S. RUSSELL, JR.,
Secretary,
Claimants.

WOOD, MATTHIESSEN &
WOOD,
Proctors.

Service accepted.

[Endorsed]: Filed Oct. 28, 1950.

reasons and causes in said libel mentioned and the said libelant and Fireman's Fund Indemnity Company, a corporation of the State of California, authorized to transact surety business in the State of Oregon, parties hereto, hereby consent and agree that in case of default or a contumacy on the part of said libelant or their surety, execution may issue against their goods, chattels and lands for the sum of \$250.00.

Now, Therefore, It is hereby stipulated and agreed for the benefit of whom it may concern that the undersigned shall be, and each of them is, bound in the sum of \$250.00, conditioned that libelant above named shall pay all costs and charges that may be awarded against it in any decree of this Court or in case of appeal, by the Appellate Court.

Dated this 11th day of September, 1950.

OREGON-WASHINGTON
BRIDGE COMPANY,

By /s/ H. LAWRENCE LISTER,
Proctor.

FIREMAN'S FUND
INDEMNITY COMPANY,

By /s/ GEORGE J. CAMPBELL,
Attorney-in-Fact.

[Endorsed]: Filed Sept. 11, 1950.

[Title of District Court and Cause.]

CLAIMS OF OWNERS

Russell Towboat & Moorage Co., owner of the tug
Lew Russell, Sr., and Russell Family, Inc., owner
of Crane Barge No. 25, appear before this Honor-
able Court and respectively claim said tug and
barge, and pray leave to defend this suit accordingly.

RUSSELL TOWBOAT &
MOORAGE CO.,

By /s/ LEW S. RUSSELL, JR.,
President.

RUSSELL FAMILY, INC.,

By /s/ LEW S. RUSSELL, JR.,
Secretary,
Claimants.

WOOD, MATTHIESSEN &
WOOD,
Proctors.

Service accepted.

[Endorsed]: Filed Oct. 28, 1950.

[Title of District Court and Cause.]

ANSWER OF RESPONDENTS AND
CLAIMANTS

To the Honorable Judges of the Above-Entitled
Court:

The answer of respondents and claimants, Russell Towboat & Moorage Co. and Russell Family, Inc., admits, denies and alleges as follows:

Article I.

Answering Article I of the libel respondents and claimants deny knowledge or information sufficient to form a belief of the allegations thereof.

Article II.

Answering Article II of the libel said respondents and claimants admit that each of them is a corporation organized and existing under the laws of the State of Oregon, and admit that Russell Towboat & Moorage Co. at all times mentioned herein was the owner and operator of the tug Lew Russell, Sr., but deny that either of said respondents had a place of business in Portland and allege that the Towboat Company's place of business was and is Vancouver, Washington, and deny that Russell Towboat & Moorage Co. was the owner and operator of Crane Barge No. 25, and allege the truth to be that Russell Family, Inc. was the owner thereof.

Article III.

Answering Article III respondents and claimants

admit that Russell Towboat & Moorage Co., at and prior to 11:30 a.m. on June 13, 1950, was moving said tug Lew Russell, Sr. upstream, or easterly, on the Columbia River with the Crane Barge No. 25, carrying a whirley crane, in tow, and that at about said time and place said equipment ran into and against the Hood River-White Salmon Bridge, owned and operated, as respondents are informed and believe and therefore say, by libelant, striking the lift span of said bridge and doing certain damage thereto, the exact nature of which respondents cannot at this time detail. The remaining allegations of said Article III respondents and claimants have not sufficient knowledge to answer and therefore deny the same.

Article IV.

Respondents and claimants deny the allegations of Article IV and each of them.

Article V.

Respondents and claimants admit the allegations of Article V.

Article VI.

Respondents and claimants admit the admiralty and maritime jurisdiction but deny that all or singular the premises are true.

For a further and separate answer and defense respondents and claimants allege as follows:

Article I.

The tug Lew Russell, Sr., with the Crane Barge on its starboard side and a gravel barge on the port

side, was proceeding up the Columbia River on June 13, 1950, and had given over 12 hours' advance notice to the owner and operator of the Hood River-White Salmon Bridge that they would be passing through the bridge so that the bridge tender could be on duty to lift the draw; that in pursuance of said notice and in conformity therewith the combined tug and tow approached the bridge from the downstream side at about 11:30 a.m. on said date, and when they reached a point about one-quarter of a mile downstream from the bridge the motors on the tug were stopped and the combined tug and tow waited until the bridge draw was raised. In that situation the bridge draw was raised and came to a stop at a height which appeared to the pilot of the tug to give sufficient clearance for the combined tug and tow to pass through; consequently they resumed their forward motion and it was not until they were within 10 or 15 feet from the bridge that it became apparent that the bridge draw had not been raised high enough to clear the crane boom on the barge, and the pilot of the tug then stopped his engines and reversed but was unable to prevent the boom colliding with the bridge; that the reason that the bridge draw was not lifted higher was that the electric power which operated it failed and the bridge gave no signal or warning that the draw was stuck. The bridge tender says that he attempted to stop the tug and tow by waving his hat but that because of the beams or braces of the bridge the pilot could not see him waving, and in fact, the pilot did not see him and received no warning of any kind

from the bridge. The accident happened through no fault of any kind on the part of the tug or the tow but through the fault of the bridge in not raising the draw lift higher and in leading the tug to assume that the lift was high enough and in not keeping the operating machinery of the draw maintained in a serviceable condition, or opening and closing it at intervals frequent enough to make sure that the machinery was in proper order for operation, as required by the United States Army Engineers' Regulations, and were also in fault for not providing the bridge with some emergency signal which could be used in the event of a power failure, and in not signalling in some visible manner to the tug that the draw lift was stuck, since this was a fact not discernible by the pilot on the tug.

Article II.

All and singular the premises are true and within the admiralty jurisdiction of this Honorable Court.

Wherefore, respondents and claimants pray that the libel be dismissed and that they may recover their costs and disbursements, and for such other relief as to the Court seems just and in accordance with the admiralty practice.

WOOD, MATTHIESSEN &
WOOD,

/s/ ERSKINE WOOD,

Proctors for Respondents and
Claimants.

State of Oregon,

County of Multnomah—ss.

I, Lew Russell, Jr., being first duly sworn, say that I am President of Respondent Russell Towboat & Moorage Co. in the above-entitled cause; that I am familiar with the contents of the within Answer, and that the allegations therein contained are true, as I verily believe.

/s/ LEW RUSSELL, JR.

Subscribed and sworn to before me this 20th day of November, 1950.

[Seal] /s/ E. J. BUHLINGER,

Notary Public for Oregon.

My commission expires Jan. 13, 1953.

Service admitted.

[Endorsed]: Filed Nov. 22, 1950.

[Title of District Court and Cause.]

STIPULATION TO ABIDE BY AND PAY THE
DECREE, SUBSTITUTED FOR STIPULA-
TION DATED OCTOBER 27, 1950

Whereas, a claim to said tug has been filed by the owner thereof, Russell Towboat & Moorage Co., and the said claimant and its surety, The Travelers Indemnity Company, hereby consenting and agreeing that in case of default or contumacy on the part of said claimant, execution issue against their goods,

chattels and lands for the sum of Thirty-one Thousand Dollars (\$31,000.00),

It is Hereby Stipulated and Agreed for the benefit of whom it may concern that the said claimant and the said surety are jointly and severally bound in the sum of Thirty-one Thousand Dollars (\$31,000.00), conditioned that the said claimant, Russell Towboat & Moorage Co., shall abide by and pay the money, including costs and disbursements awarded against it by the final decree rendered in this cause by this court, or in case of an appeal by the appellate court.

This bond to become effective immediately on cancellation by order of the above-entitled court of said stipulation dated October 27, 1950.

Dated December 21st, 1950.

RUSSELL TOWBOAT &
MOORAGE CO.

By /s/ THOMAS J. WHITE,
Attorney, Principal.

[Seal] THE TRAVELERS
INDEMNITY COMPANY,

By /s/ H. V. LACEY,
Surety.

[Endorsed]: Filed Dec. 22, 1950.

[Title of District Court and Cause.]

ORDER PERMITTING ERSKINE WOOD,
ATTORNEY TO WITHDRAW

December 22, 1950

Libelant appearing by Mr. H. L. Lister, of proctors, and the respondents by Mr. Lofton L. Tatum, of proctors.

It Is Ordered that Mr. Erskine Wood, be, and he is hereby, permitted to withdraw as proctor for the respondents, and that Mr. Thomas J. White, an attorney of this court, be and he is hereby, appointed as proctor on behalf of the respondents.

[Title of District Court and Cause.]

STIPULATION OF PROCTORS

It is hereby stipulated by and between Messrs. Gray and Lister by H. Lawrence Lister, Proctors for libelant Oregon-Washington Bridge Company, and Messrs. Wood, Matthiessen & Wood by Erskine Wood, Proctors for respondent and claimant Russell Towboat and Moorage Company, as follows:

(1) That said parties have no objection to Russell Family, Inc., filing and prosecuting its intervening libel in the above-entitled cause;

(2) That said intervening libelant Russell Family, Inc. may apply to the above-entitled Court ex parte, and without notice for order permitting

the filing of an intervening libel in rem and personam in the above-entitled cause.

Dated, December 26, 1950.

/s/ H. LAWRENCE LISTER,
Proctor for Libelant.

/s/ ERSKINE WOOD,
Proctor for Respondent and Claimant Russell Tow-
boat & Moorage Company.

[Endorsed]: Filed Dec. 27, 1950.

[Title of District Court and Cause.]

ORDER PERMITTING FILING OF INTER-
VENING LIBEL IN REM AND PERSONAM

Upon the reading of the petition and intervening libel in rem and personam of Russell Family, Inc., and the stipulation of proctors in the above-entitled cause, and good cause appearing therefor;

It Is Hereby Considered and Ordered that Russell Family, Inc., may intervene in the above-entitled cause in admiralty and file its intervening libel in rem and personam.

Dated this 27th day of December, 1950.

/s/ CLAUDE McCOLLOCH,
Judge of the U. S. District
Court.

[Endorsed]: Filed Dec. 27, 1950.

In the District Court of the United States for the
District of Oregon

In Admiralty—Civil No. 5749

OREGON-WASHINGTON BRIDGE COMPANY,
Libelant,

vs.

TUG "LEW RUSSELL, SR." and CRANE
BARGE NO. 25, in Rem,

and

RUSSELL TOWBOAT AND MOORAGE COM-
PANY, Owner of Said Tug and Barge,
Respondents.

RUSSELL FAMILY, INC., a Corporation,
Intervening Libelant,

vs.

THE HOOD RIVER-WHITE SALMON BRIDGE,
Its Gear and Paraphernalia, in Rem,

and

OREGON-WASHINGTON BRIDGE COMPANY,
a Corporation, Owner and Operator of Said
Bridge,

Respondents.

PETITION AND INTERVENING LIBEL IN
REM AND PERSONAM

To the Honorable James Alger Fee, the Honorable
Claude McColloch, and the Honorable Gus
Jerome Solomon, Judges of the Above-Entitled
Court, in Admiralty Sitting:

Comes now Russell Family, Inc. a corporation as the owner of the "Crane Barge No. 25," petitions the Court for leave to intervene in the above suit in admiralty; to implead the "Hood River-White Salmon Bridge" and to file and prosecute the herein intervening libel against said Hood River-White Salmon Bridge and the Oregon-Washington Bridge Company, in personam and rem, and for cause of action for damages, civil and maritime alleges:

Article I.

That the relief sought by intervening libelant in this herein intervening libel arises out of the same collision and/or events as does the claims and allegations made by original libelant Oregon-Washington Bridge Company against certain respondents in this cause No. 5749, now pending.

Article II.

That the intervening libelant, Russell Family, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon with its principal place of business in the City of Portland, Oregon. That said intervening libelant was at all times herein mentioned and now is the owner of that certain Crane Barge No. 25 together with its gear, tackle and paraphernalia thereon, including a Whirley Crane attached thereto.

Article III.

That now and at all times herein mentioned respondent Oregon-Washington Bridge Company was and now is a corporation organized and existing

under the laws of the State of Washington, and doing business within the State of Oregon in connection with the ownership and operation of that certain highway bridge across the Columbia River in the State of Oregon, near the town of Hood River, known as the Hood River-White Salmon Bridge.

Article IV.

That respondent Hood River-White Salmon Bridge, is a structure erected across the Columbia River near the town of Hood River, Oregon, containing a draw to permit passage of vessels under same and was at all times herein mentioned owned and operated by said respondent Oregon-Washington Bridge Company.

Article V.

That at all times herein mentioned Crane Barge No. 25, its equipment, gear and paraphernalia was unmanned.

Article VI.

That on or about the 13th day of June, 1950, that certain Crane Barge No. 25, together with its gear and paraphernalia was being moved up the Columbia River by a tug named "Lew Russell, Sr.," which tug was being operated by others than this intervening libelant. That the operator of said tug, "Lew Russell, Sr.," had given over twelve hours advance notice to the owner and operator of said Hood River-White Salmon Bridge, to effect that said tug with said Crane Barge No. 25 would be passing through said Hood River-White Salmon Bridge; that in pursuance of said notice, and in conformity there-

with, said tug and its tow, (Crane Barge No. 25), approached said bridge of the downstream side at about 11:30 a.m. on the 13th day of June, 1950, and when said tug with its tow reached a point about one-quarter of a mile downstream from said bridge, the engines on said tug were stopped and the combined tug and tow waited until the bridge draw was raised. That respondent, Oregon-Washington Bridge Company did raise the draw of said bridge but failed and neglected to raise said draw high enough to permit the passage of the tug and tow under same. That the fact that said draw bridge was not raised sufficiently to permit clearance of said tug and tow was not discernible to the pilot of said tug at the time said draw came to rest at its raised height and at the time the said tug, with its tow, resumed its forward motion up the river. It was not until said tug and tow were within ten or fifteen feet of the bridge that it became apparent to the pilot of said tug that the bridge draw had not been raised high enough to clear the crane boom on said Barge No. 25. At that time the pilot of said tug immediately stopped the engines of said tug and reversed same but was unable to prevent the boom on said crane barge No. 25 from striking said bridge draw which had not been raised sufficiently. That at no time from the moment the said bridge draw was raised until said collision, did the pilot of the tug receive any signal or warning from the bridge.

Article VII.

That the damage to said intervening libelant and

its property as hereinafter more particularly set forth was caused by the carelessness and negligence of respondent Oregon-Washington Bridge Company and its agents in the following respects among others:

(1) In failing to raise the draw of said bridge sufficiently high to permit clearance of libelant's Crane Barge No. 25.

(2) Failure to give any signal or warning to said tug and tow that was proceeding under said bridge of the fact that said draw was not raised sufficiently to permit passage of said tug and tow.

(3) Failure to keep the machinery that operated the said draw maintained in a serviceable condition.

(4) Failure to open and close said bridge at intervals frequently enough to assure that the machinery for operating same was in proper order, or otherwise test such machines as is required by the United States Engineers Regulations respecting the operation of draw bridges over navigable waters at will or by reasonable prudence.

(5) Failure to have any emergency signals or equipment for making such signals available upon said bridge for warning vessels away from passing through said bridge when the bridge was not properly and sufficiently opened in the event of any power failure or other reasons for failure of normal signalling equipment to operate.

(6) Knowing that by reason of the circumstances

the pilot of the tug and tow had to rely upon the operator of said bridge to raise same to the proper height to permit passage of the tug and tow thereunder and said operator failing to notice in time the creation of the dangerous situation and condition involved in his failure to raise said draw to the proper height and when said operator of the bridge, if he did notice said dangerous situation, failing to adequately and properly, or at all, warn pilot of said tug towing said barge of the danger.

Article VIII.

That as the direct and proximate result of the negligence of respondent the crane secured to the deck of said Crane Barge No. 25 was ripped from the deck plates damaging said barge as well as said crane. That the reasonable and necessary cost to repair said barge and the crane attached thereto was \$1,824.24 which intervening libelant paid to have said damage repaired and to place said barge and crane in the condition it was immediately before the aforesaid collision.

Article IX.

That libelant was damaged by loss of use of said Crane Barge No. 25 for a period of one month which time was the necessary and reasonable length of time required to repair said Crane Barge No. 25. That the value of use of said Crane Barge No. 25 is \$2,500.00 per month and in this respect, by reason of loss of use of said Crane Barge No. 25, while the same was being repaired, intervening libelant was further damaged in the amount of \$2,500.00.

Article X.

That said respondent Hood River-White Salmon Bridge and said respondent Oregon-Washington Bridge Company are each now within the geographical jurisdiction of this Honorable Court.

Article XI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, intervening libelant prays:

(1) That a process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against Hood River-White Salmon Bridge;

(2) That any persons claiming any interest therein may be required to appear and answer on oath all and singular the matters aforesaid;

(3) That libelant may have a decree for its damages in the sum of \$4,324.24, together with interest thereon as allowed by law, and costs of libel incurred herein;

(4) That said Hood River-White Salmon Bridge may be condemned and sold to satisfy the damages of the libelant herein;

(5) That process in due form of law, according to the practice of this Honorable Court, may issue against the respondent, Oregon-Washington Bridge Company, citing it to appear and answer on oath the matters and things aforesaid;

(6) That this Honorable Court may adjudge and decree that the respondent Oregon-Washington Bridge Company, pay to intervening libelant its damages as aforesaid with interest and costs, and

(7) That the Court will grant to this intervening libelant such other further relief as the justice of the cause may require.

/s/ THOMAS J. WHITE,

/s/ WILLIAM F. WHITE,

Proctors for Intervening
Libelant.

State of Oregon,

County of Multnomah—ss.

I, Lew S. Russell, Jr., being first duly sworn, upon oath depose and say: That I am the Secretary of Libelant corporation, Russell Family, Inc.; That I have read the foregoing Petition and Intervening Libel, know the contents thereof, and that it is true as I verily believe.

/s/ LEW S. RUSSELL, JR.,

Subscribed and sworn to before me on the 22nd day of December, 1950.

[Seal] /s/ THOMAS J. WHITE,
Notary Public for Oregon.

My commission expires July 30, 1954.

[Endorsed]: Filed Dec. 27, 1950.

[Title of District Court and Cause.]

LIBELANTS' STIPULATION FOR COSTS

Whereas, the above-entitled intervening libelant, Russell Family, Inc., a corporation, are filing an intervening libel in the above-entitled court and cause against the Hood River-White Salmon Bridge, its gear and paraphernalia, in rem, and Oregon-Washington Bridge Company, a corporation, Owner and Operator of said Bridge, as respondents, for reasons and causes in the said intervening libel mentioned, and Russell Family, Inc., a corporation, as principal and American Surety Company of New York, a corporation, authorized to transact a surety business in the State of Oregon as surety, parties hereto, hereby agreeing and consenting that in case of default or contumacy on the part of said Russell Family, Inc., or said surety, execution may issue against their, and each of their goods, chattels and land in the sum of \$250.00;

Now Therefore, It Is Hereby Stipulated and Agreed for the benefit of whom it may concern that the undersigned shall be, and each of them is, bound in the sum of \$250.00, conditioned that the said Russell Family, Inc., shall pay all costs and charges that may be awarded against it in any decree of this court or in the case of appeal, by the appellant court, in this cause.

Dated at Portland, Oregon, this 26th day of December, 1950.

RUSSELL FAMILY, INC.,

By /s/ WILLIAM F. WHITE,
One of Their Proctors,
"Principal."

[Seal] AMERICAN SURETY COM-
PANY OF NEW YORK,

By /s/ JEAN D. SAUNDERS,
President, Vice-President,
"Its Surety."

By /s/ J. SWANSON,
Resident Assistant Secretary.

[Endorsed]: Filed Dec. 28, 1950.

[Title of District Court and Cause.]

ANSWER OF LIBELANT TO THE INTER-
VENING LIBEL IN REM AND PER-
SONAM FILED BY RUSSELL FAMILY,
INC.

To the Honorable James Alger Fee, the Honorable
Claude McColloch, and the Honorable Gus
Jerome Solomon, Judges of the Above-Entitled
Court, in Admiralty Sitting:

Comes now libelant, Oregon-Washington Bridge
Company, and for answer to the Intervening Libel
in Rem and Personam filed by Russell Family, Inc.,
admits, denies and alleges:

Article I.

Admits the allegations of Article I.

Article II.

Admits that the Russell Family, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon with its principal place of business in the City of Portland, Oregon. Alleges that libelant has no knowledge or information sufficient to form a belief as to the truth or falsity of the other allegations of Article II and therefore denies the same and the whole thereof, except as herein specifically admitted.

Article III.

Admits the allegations of Article III.

Article IV.

Admits the allegations of Article IV.

Article V.

Alleges that libelant has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Article V, and therefore denies the same and the whole thereof.

Article VI.

Admits that on or about the 13th day of June, 1950, that certain Crane Barge No. 25, together with its gear and paraphernalia was being moved up the Columbia River by a tug named "Lew Russell, Sr."; that over twelve hours advance notice to representatives of the owner and operator of said

Hood River-White Salmon Bridge had been given to the effect that the tug with the tow would be passing through said Hood River-White Salmon Bridge; that said tug with its tow approached the bridge on the downstream side at about 11:30 a.m. on the 13th day of June, 1950; that libelant, Oregon-Washington Bridge Company, did raise the draw of its bridge to a point where further raising was made impossible because of the failure of the power which was supplied by a third party not under the direction and control of libelant and that before the draw of the bridge had been raised sufficiently to permit the crane barge with its crane in an elevated position to pass under said draw, the said crane barge ran into and against the bridge draw or the lift span of said bridge; that as soon as it became evident to the representatives of libelant that the power had failed and that the draw could not be raised higher, signals were given to the persons in charge of Crane Barge No. 25, and an attempt was made to warn and halt the forward progress of said Crane Barge No. 25, but regardless of this effort, said Crane Barge No. 25, continued upstream with the crane in a raised position and so proceeding ran into and against the lift or draw span of said bridge, causing the damage complained of in libelant's libel. Except as herein specifically admitted and alleged, denies each and every allegation and the whole of Article VI.

Article VII.

Denies each and every allegation and the whole

of Article VII. Libelant further alleges that the crane on said Crane Barge No. 25, could have been lowered and so passed under the draw span of said bridge in the position in which it was stopped at the time the accident occurred.

Article VIII.

Denies each and every allegation and the whole of Article VIII.

Article IX.

Alleges that libelant has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Article IX and therefore denies the same and the whole thereof.

Article X.

Admits the allegations of Article X.

Article XI.

Admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court. Except as herein specifically admitted, denies each and every allegation and the whole of Article XI. Except as herein specifically admitted, denies each and every allegation and the whole of Article XI.

Wherefore, libelant prays that the Intervening Libel in Rem and in Personam be dismissed and that it recover its costs and disbursements from Russell Family, Inc., a corporation, intervening libelant, and for such other and further relief as

to the court seems just and in accordance with admiralty practice.

GRAY & LISTER,

/s/ H. LAWRENCE LISTER,

Proctors for Libelant and Respondent to Intervening Libel.

State of Oregon,

County of Multnomah—ss.

I, Elbert M. Chandler, being first duly sworn say that I am the President of Oregon-Washington Bridge Company, libelant and respondent to Intervening Libel in the above-entitled court and cause; that I am familiar with the contents of the within Answer of Libelant to the Intervening Libel in Rem and Personam and that the allegations therein contained are true as I verily believe.

/s/ ELBERT M. CHANDLER.

Subscribed and sworn to before me this 2nd day of January, 1951.

[Seal] /s/ H. LAWRENCE LISTER,
Notary Public for Oregon.

My commission expires May 2, 1952.

Service of the within Answer by certified copy at Portland, Oregon, this day of January, 1951, is hereby admitted.

/s/ ERSKINE WOOD,

Of Proctors for Respondents, Russell Towboat & Moorage Company and Tug "Lew Russell Sr."

THOMAS J. WHITE,

By /s/ WILLIAM F. WHITE,

Of Proctors for Intervening Libelant.

[Endorsed]: Filed Jan. 3, 1951.

[Title of District Court and Cause.]

COST BILL OF RUSSELL FAMILY, INC.

Statement of Disbursements claimed by the Russell Family, Inc., Intervening Libelant, in the above-entitled cause, viz.:

Claim:

Attorneys Fees, Proctors Fee (Statutory)	\$20.00
Premium for Corporate Surety Bond for	
Costs	10.00

Allowed:

Cost Taxed at.....	\$30.00
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Dated Feb. 21st, 1951.

/s/ LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy.

Duly verified.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

LIBELANT'S EXCEPTIONS AND OBJEC-
TIONS TO THE FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECREE

Comes now libelant and excepts to the findings of fact presented in the above-captioned court and cause on the ground and for the reason that said findings

of fact, conclusions of law and decree and each thereof are contrary to the evidence and the law and libelant specifically excepts to the finding in paragraph 4, to the effect that the tug and tow came to a stop more than a quarter of a mile below the bridge owned and operated by libelant.

Libelant further excepts to the finding that the navigator of the tug rightly and justifiably believed that the bridge tender had raised it high enough to enable the tug and tow to pass through.

Libelant further excepts to the finding that it is immaterial that no signal required by the regulations promulgated by the Corps of Engineers was given by the tug in that under the decisions the giving of the signal required by statute is a condition precedent to any assumption on the part of the tug operator that the bridge would be in readiness for his tug and tow to pass through.

Libelant further excepts to the proposed finding that there had been power failures on several occasions prior to June 13, 1950, on the ground and for the reason that this proposed finding is not consistent with the evidence.

Libelant further excepts to the proposed finding that the line of vision between the tug operator and the bridge tender was obstructed by the steelwork of the bridge upon the ground and for the reason that the exhibits in evidence and the testimony demonstrate that the bridge tender was clearly visible to the tug operator for a considerable distance and at least during the last 300 feet traveled by said tug and tow prior to the impact.

Libelant further excepts to the statement in the proposed findings of fact appearing in lines 31 and 32, page 3, and lines 1 and 2, page 4, of the proposed findings of fact upon the ground and for the reason that the statement of the bridge tender was not admitted in evidence and libelant moves that said language be deleted from the proposed findings of fact.

Libelant excepts to the proposed finding in paragraph 5, that the crane barge was damaged as a direct and proximate result of the negligence of Oregon-Washington Bridge Company, and its bridge.

Libelant excepts to the attempt to incorporate in the findings of fact the opinion of the court set out in paragraph 6, pages 4 and 5, of the proposed findings of fact.

Libelant excepts to the proposed conclusions based upon said proposed findings of fact and libelant excepts to the decree presented to the court based upon said findings of fact and conclusions of law. In presenting each and every exception libelant contends that the proposed findings of fact, conclusions of law and decree and each thereof are not supported by the evidence but are contrary to the evidence, the preponderance of which evidence establishes the facts that the collision and the resulting damages were caused by the failure of the tug and its operators to maintain a proper or any lookout; in proceeding at a speed which made it impossible to stop the tug and its tow when the operator thereof became aware of the impending

collision and in failing to keep the tug and the barge under such control that it could have been stopped or otherwise maneuvered so as to have avoided colliding with the bridge and in failing and neglecting to give the signal required by the regulations and waiting thereafter until some affirmative evidence had been furnished by the bridge or its tender that the bridge was in readiness for the tug and tow to proceed.

Dated this 20th day of February, 1951.

Respectfully submitted,

/s/ H. LAWRENCE LISTER,

GRAY & LISTER,

Proctors for Libelant.

State of Oregon,

County of Multnomah—ss.

Due service of the within Exceptions and Objections is hereby accepted this 20th day of February, 1951, by receiving a copy thereof, duly certified to as such by H. Lawrence Lister, of proctors for Libelant

/s/ ERSKINE WOOD,

Of Proctors for Respondent, Russell Towboat and Moorage Company, et al.

/s/ THOMAS J. WHITE,

Of Proctors for Russell Family, Inc., Intervening Libelant.

[Endorsed]: Filed Feb. 20, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSION

Findings of Fact

1. Oregon-Washington Bridge Company, is a Washington corporation, and at the time of the collision hereinafter referred to was the owner and operator of the Hood River-White Salmon Bridge across the Columbia River. Russell Towboat and Moorage Company at the time of said collision and Russell Family, Inc., were respectively the owners of the Tug "Lew Russell, Sr." and Crane Barge No. 25, and each is an Oregon corporation.

2. On June 13, 1950, shortly before 12 o'clock noon, the tug "Lew Russell, Sr." with Crane Barge No. 25, in tow, attempted to proceed through the said bridge, and because the draw lift was not raised high enough the end of the boom on Crane Barge No. 25, collided with the drawlift, and said lift and said boom were each damaged.

3. Oregon-Washington Bridge Company filed its libel against the tug and the barge and their owners for damage to the bridge, and Russell Family, Inc., as owner of the barge, filed its intervening libel against the bridge and its owner for damages to the boom. The case was tried on these libels and the answers thereto and all the evidence was taken in open court, the witnesses testifying in person.

4. The facts and circumstances of the collision were as follows:

The bridge is high enough above the water so that ordinary river craft can pass through it without lifting the draw. When, however, because of the stage of the water or the height of any craft, it is necessary to raise the drawlift, the practice is for the owner of the craft to give 12 hours' notice to the bridge that it is intending to pass through the bridge, so that the bridge tender can be on hand to lift the draw. Pursuant to this practice the owner of the tug "Lew Russell, Sr." gave the required notice that it would be passing through the bridge with a high tow, and would require the draw to be lifted. In consequence, the bridge tender and an associate electrician were on the bridge on hand to raise the draw when the tug and tow approached. The tug and tow did approach and came to a stop more than a quarter of a mile below the bridge. This was shortly before noon on June 13, 1950, on a clear, sunny day. The bridge tender recognized the tug and tow as the ones for which notice had been given and raised the draw lift a distance of about $13\frac{1}{2}$ feet from its original position. The lift then came to a stop because of a failure of electric power, which was furnished from the shore. The navigator of the tug, seeing the draw lift raised and then come to a stop, rightly and justifiably believed that the bridge tender had raised it high enough to enable the tug and tow to pass through. He thereupon started up his engines, resumed his speed and proceeded forward at a speed of about $11\frac{1}{2}$

miles per hour. The Regulations promulgated by the Corps of Engineers provide that a vessel desiring the draw to lift shall signify that fact by a whistle signal. In this instance no such signal was given by the tug. But that is immaterial and in no way was a contributing cause of the collision because the fact is that the bridge tender saw the tug and tow, knew it was the tug and tow which he had been expecting, and proceeded to raise the lift precisely as he would have done had a signal been given.

The bridge was equipped with a whistle, which, had there been no power failure, it could have used to sound a warning or danger signal to the tug when the draw lift came to a stop. But the whistle was also dependent upon the electric power, and consequently when that power failed the whistle could not be used. There was no auxiliary whistle or other emergency signal of any kind on the bridge which could be operated in the event of a power failure, although power failures had occurred on at least three occasions before this, not, however, while the draw lift was being raised.

The bridge tender, when he realized that the lift was stuck, stepped out on the platform of the control tower on the upstream side thereof and waved his hat to the tug, but the line of vision between him and the tug was obstructed by the steel work of the bridge itself and the navigator of the tug never saw the bridge tender until after the collision.

When the tug and tow were below the bridge at a point where the top of the boom of Crane Barge

25 was about fifteen feet from the bridge the navigator first saw that the top of the boom was likely to strike the draw lift. Prior to that time it was not apparent that it would not clear. He reversed his engines, but notwithstanding this the top of the boom struck the draw lift, causing damage to both. The barge and the boom were without any motive power and were in complete control of the tug and lashed alongside of it.

5. That as a direct and proximate result of the negligence of Oregon-Washington Bridge Company and its bridge, Crane Barge 25, was damaged in the sum of \$3,306.11.

6. The Court rendered an oral opinion from the Bench, the transcript of which is here inserted and embodied in these Findings and made a part hereof. Said opinion is as follows:

“I do not find any negligence on the part of either the tug or the barge, and I find that the bridge was negligent in not maintaining an auxiliary whistle or some other signaling device not dependent upon the bridge’s power lines which could have been used in the event of a power failure or other emergency.

“The failure of the tug to signal the bridge to open the draw does not constitute negligence because the undisputed evidence shows that the bridge tender saw the tug and proceeded to raise the span when the tug was more than one-quarter mile from the bridge. The span was raised 13½ feet and then stopped.

"When the span was raised to that height, the tug proceeded slowly, believing that the span was high enough for it to proceed through it with safety. I find that the tug had the right to assume that the span was raised high enough and that it therefore had the right to proceed.

"I do not find that the bridge was negligent by reason of the fact that a power failure prevented it from raising the span higher, but I do find that it was negligent for failing to provide an auxiliary signal, not dependent upon its power supply, so that an oncoming vessel could have been warned in the event of a power failure or other emergency which rendered it dangerous for a ship to proceed. While it is true that the span had always opened without difficulty in the past, power failures had occurred on several occasions and an ordinary prudent bridge-owner could have reasonably anticipated that a power failure could have occurred during the lifting of its movable span.

"The bridge tender's attempt to signal the oncoming tow by waving his hat, while standing on the upriver side of the bridge next to the pilot house behind some steel girders, is commendable but, in the absence of having attracted the attention of the tow personel, does not relieve the bridge-owner of its obligation to maintain an adequate auxiliary signal, nor does it make the tow negligent for its failure to observe such hand signal. The presence of a

small red reflector which was unilluminated in broad daylight in the middle of the lift span did not constitute a warning to the tow, particularly when the evidence showed that the reflector, even when illuminated, did not turn green except when the span was raised to its full height and that the span had been so raised on only a few occasions during all of its years of operation.

“Russell Towboat and Moorage Co., respondent and claimant of the Tug “Lew Russell, Sr.,” is entitled to a judgment for costs against the Libelant, and Russell Family, Inc., claimant of the Crane Barge No. 25, is entitled to a judgment on its counterclaim against libelant for its damages in the sum of \$3,306.11, and for its costs.”

Conclusion

A decree should be entered dismissing the libel of Oregon-Washington Bridge Company, and awarding to Russell Family, Inc., damages in the sum of \$3,306.11, against Oregon-Washington Bridge Company, with interest at six per cent per annum from date of the decree, and both the Moorage Company and the Family, Inc., should recover their costs and disbursements from the Bridge Company.

Dated March 5, 1951.

/s/ GUS J. SOLOMON,
Judge.

Copy received:

/s/ ERSKINE WOOD,

/s/ H. LAWRENCE LISTER,

/s/ WILLIAM F. WHITE.

[Endorsed]: Filed Mar. 5, 1951.

In the District Court of the United States for the
District of Oregon

In Admiralty—Civil No. 5749

OREGON-WASHINGTON BRIDGE COMPANY,
Libelant,

vs.

TUG "LEW RUSSELL, SR." and CRANE
BARGE No. 25, in Rem,

and

RUSSELL TOWBOAT AND MOORAGE COM-
PANY and RUSSELL FAMILY, INC., in
Personam,

Respondents.

RUSSELL TOWBOAT AND MOORAGE COM-
Pany, Claimant of the Tug "Lew Russell, Sr.,"

and

RUSSELL FAMILY, INC., Claimant of Crane
Barge No. 25.

RUSSELL FAMILY, INC.,

Intervening Libelant,

vs.

THE HOOD RIVER-WHITE SALMON
BRIDGE, Its Gear and Paraphernalia, in Rem,
and

OREGON-WASHINGTON BRIDGE COMPANY,
Owner and Operator of Said Bridge,
Respondent.

FINAL DECREE

This cause came on for trial on January 25, 1951, in this Court before the Honorable Gus J. Solomon, Judge thereof, sitting in admiralty, and the Court having heard the opening statements of counsel, the testimony of the witnesses and oral arguments, and having made his Findings of Fact and Conclusions of Law, it is now

Considered, Ordered and Decreed that the libel of Oregon-Washington Bridge Company be and the same hereby is dismissed and that Russell Towboat and Moorage Company and Russell Family, Inc., each have and recover its costs and disbursements from Oregon-Washington Bridge Company and its stipulator, taxed at for the Russell Towboat and Moorage Company and for the Russell Family, Inc.; and

It Is Further Considered, Ordered and Decreed that Russell Family, Inc., have and recover from Oregon-Washington Bridge Company the sum of

\$3,306.11, without interest from the date of the collision, but with interest at six per cent per annum from the date of this decree, and that if said sum, with costs and disbursements as allowed, is not paid within 30 days of the date of this decree, execution issue therefor; and

It Is Further Considered, Ordered and Decreed that Russell Towboat and Moorage Company, and Russell Family, Inc., and their sureties, are all relieved from all obligations from such stipulations as they may have filed in this cause, either to abide and pay the decree or for costs, and the obligations of said stipulations are hereby cancelled.

Dated this 5th day of March, 1951.

/s/ GUS J. SOLOMON,
Judge.

Copies received.

[Endorsed]: Filed Mar. 5, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Tug "Lew Russell, Sr." and Crane Barge No. 25, and Russell Family, Inc., as Respondents, as Claimant, and as Intervening Libelant, and to William F. White, their Attorney, and

To Russell Towboat and Moorage Company and to Wood, Matthiessen & Wood, Its Attorneys:

You and each of you please take notice that Oregon-Washington Bridge Company, the Libelant

in the above-entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the findings of fact, conclusions of law and decree made and entered in the above-captioned court and cause on or about the 5th day of March, 1951, and Libelant appeals from each and every part of said findings, conclusions and decree.

Dated this 4th day of June, 1951.

/s/ H. LAWRENCE LISTER,

GRAY & LISTER,

Proctors for Libelant.

State of Oregon,

County of Multnomah—ss.

Due service of the within Notice of Appeal is hereby accepted in Multnomah County, Oregon, this 4th day of June, 1951, by receiving a copy thereof, duly certified to as such by H. Lawrence Lister, of Proctors for Libelant.

/s/ WILLIAM F. WHITE, D. P.

Of Proctors for Tug "Lew Russell, Sr.," Crane Barge No. 25, and Russell Family, Inc., Respondents & Intervening Libelant.

/s/ LOFTON L. TATUM,

Of Proctors for Russell Towboat and Moorage Company.

[Endorsed]: Filed June 4, 1951.

[Title of District Court and Cause.]

PETITION FOR APPEAL

The libelant, Oregon-Washington Bridge Company, being aggrieved by the decree, conclusions and findings of the United States District Court herein claims an appeal from said decree, conclusions and findings made and entered on or about the 5th day of March, 1951, and prays that its said appeal may be allowed.

OREGON-WASHINGTON BRIDGE COMPANY,

By /s/ H. LAWRENCE LISTER,
Of Its Proctors.

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Petition for Appeal is hereby accepted in Multnomah County, Oregon, this 4th day of June, 1951, by receiving a copy thereof, duly certified to as such by H. Lawrence Lister, of Proctors for Libelant.

/s/ WILLIAM F. WHITE, D. P.
Of Proctors for Tug "Lew Russell, Sr.," Crane
Barge No. 25, and Russell Family, Inc., Re-
spondents & Intervening Libelant.

/s/ LOFTON L. TATUM,
Of Proctors for Russell Towboat and Moorage Com-
pany.

[Endorsed]: Filed June 4, 1951.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The libelant above-named having served and filed its notice of appeal and having petitioned the court for an appeal from the decree, conclusions and findings made and entered in this court and cause on or about the 5th day of March, 1951 and the court being fully advised

It Is Hereby Ordered that libelant's appeal be and the same hereby is allowed to the Circuit Court of Appeals for the Ninth Circuit.

Dated this 4th day of June, 1951.

/s/ GUS J. SOLOMON,

United States District Judge.

[Endorsed]: Filed June 6, 1951.

[Title of District Court and Cause.]

APPELLANT'S ASSIGNMENT OF ERRORS

The libelant, Oregon-Washington Bridge Company, hereby assigns error in the proceedings, decrees, orders and decisions of the District Court in the above-entitled action as follows:

First. The District Court erred in failing and refusing to sustain libelant's exceptions and objections to the findings of fact, conclusions of law and decree made by the District Court in this cause on or about the 5th day of March, 1951.

Second. The District Court erred in finding that the tug and tow came to a stop more than a quarter of a mile below the bridge owned and operated by libellant.

Third. The District Court erred in finding that the navigator of the tug rightly and justifiably believed that the bridge tender had raised the bridge high enough to enable the tug and tow to pass through.

Fourth. The District Court erred in finding that it is immaterial that no signal required by the regulations promulgated by the Corps of Engineers was given by the tug in that under the decisions the giving of the signal required by statute is a condition precedent to any assumption on the part of the tug operator that the bridge would be in readiness for his tug and tow to pass through.

Fifth. The District Court erred in finding that there had been power failures on at least three occasions prior to June 13, 1950, on the ground and for the reason that this finding is not consistent with the evidence.

Sixth. The District Court erred in finding that the line of vision between the tug operator and the bridge tender was obstructed by the steel work of the bridge upon the ground and for the reason that the exhibits in evidence and the testimony demonstrate that the bridge tender was clearly visible to the tug operator for a considerable distance and at least during the last three hundred feet traveled by said tug and tow prior to the impact with the bridge.

Seventh. The District Court erred in finding that the crane barge was damaged as a direct and proximate result of the negligence of libelant and its bridge.

Eighth. The District Court erred in incorporating in the findings of fact the opinion of the court set out in paragraph 6, pages 4 and 5, of the findings of fact.

Ninth. The District Court erred in making conclusions of law based upon the findings of fact and the District Court erred in making its decree based upon said findings of fact and said conclusions.

Tenth. The District Court erred in making its findings of fact, conclusions of law and its decree and each thereof in that each of said findings herein excepted to and the conclusions and decree based thereon are not supported by the evidence, but are contrary to the evidence and the law as applied to said evidence.

Eleventh. The District Court erred in failing and refusing to find that the collision and the resulting damages were caused by the failure of the tug and its operators to maintain a proper or any lookout, in proceeding at a speed which made it impossible to stop the tug and tow when the operator thereof became aware of the impending collision and in failing to keep the tug and barge under such control that it could have been stopped or otherwise maneuvered so as to have avoided colliding with the libelant's bridge and in failing and neglecting to give the signal required by the regulations and waiting thereafter until some affirmative evidence

had been furnished by the bridge or its tenders that the bridge was in readiness for the tug and tow to proceed.

Twelfth. The District Court erred in finding and decreeing that Russell Family, Inc., have and recover from libellant, Oregon-Washington Bridge Company the sum of \$3,306.11.

Dated this 6th day of June, 1951.

/s/ H. LAWRENCE LISTER,

GRAY & LISTER,

Proctors for Appellant.

State of Oregon,

County of Multnomah—ss.

Due service of the within Appellant's Assignment of Errors is hereby accepted in Multnomah County, Oregon, this day of June, 1951, by receiving a copy thereof, duly certified to as such by H. Lawrence Lister, of Proctors for Appellant.

/s/ LOFTON L. TATUM,

Of Proctors for Russell Towboat and Moorage Company.

/s/ THOMAS J. WHITE,

/s/ WILLIAM F. WHITE,

Of Proctors for Russell
Family, Inc.

[Endorsed]: Filed June 6, 1951.

[Title of District Court and Cause.]

BOND ON APPEAL STAYING EXECUTION

Know All Men By These Presents, That we, Oregon-Washington Bridge Company, and we, Fireman's Fund Indemnity Company, authorized to transact surety business in the State of Oregon, are held and firmly bound unto respondents and to Russell Family, Inc., intervening libelant, in the sum of \$250.00 and in the further sum of \$3,500.00 to be paid to the said respondents or to Russell Family, Inc., as an intervening libelant, their successors or assigns for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our successors and assigns, jointly and severally firmly by these presents. Sealed with our seals and dated the 7th day of June, 1951, and

Whereas, Oregon-Washington Bridge Company, libelant, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree, conclusions and findings of the District Court of the United States for the District of Oregon, bearing date of March 5, 1951, in a suit in which Oregon-Washington Bridge Company is libelant, the Tug "Lew Russell, Sr." and Crane Barge No. 25, Russell Towboat and Moorage Company and Russell Family, Inc., are respondents and Russell Family, Inc., is the claimant of said Tug "Lew Russell, Sr." and Crane Barge No. 25, and is an intervening libelant, which decree ordered libelant, Oregon-Washington Bridge Company to pay the costs of Russell Towboat and Moorage Company

and of Russell Family, Inc., and to pay to Russell Family, Inc., \$3306.11 with interest at the rate of six per cent per annum from the 5th day of March, 1951, and, whereas, Oregon-Washington Bridge Company, libelant, desires during the process of such appeal to stay the execution of said decree of the District Court:

Now, Therefore, the condition of this obligation is such that if the above-named appellant Oregon-Washington Bridge Company, shall prosecute said appeal with effect and pay all costs which may be awarded against it as such appellant if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Court of Appeals for the Ninth Circuit in this cause, or on the mandate of said court by the court below, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

[Seal] OREGON-WASHINGTON
BRIDGE COMPANY.

By /s/ ELBERT M. CHANDLER.

[Seal] FIREMAN'S FUND
INDEMNITY COMPANY,

By /s/ B. JACOBS,
Surety.

State of Oregon,
County of Multnomah—ss.

Due service of the within Bond on Appeal Staying Execution is hereby accepted in Multnomah

County, Oregon, this 7th day of June, 1951, by receiving a copy thereof, duly certified to as such by H. Lawrence Lister of proctors for libelant.

/s/ LOFTON L. TATUM,
Of Proctors for Russell Towboat and Moorage
Company.

/s/ THOMAS J. WHITE,

/s/ WILLIAM F. WHITE,
Of Proctors for Russell
Family, Inc.

[Endorsed]: Filed June 7, 1951.

[Title of District Court and Cause.]

ORDER APPROVING BOND AND STAYING EXECUTION

Libelant having served and filed in this court and cause a supersedeas bond duly executed by libelant as principal and by the Fireman's Fund Indemnity Company, a corporation, as surety, and the court having considered the files and records herein, now therefore, upon oral application in open court and the court being fully advised,

It Is Hereby Ordered that the bond filed herein by libelant be and the same hereby is approved and that execution upon the decree in this court and cause be stayed during the pendency of the appeal

to the Circuit Court of Appeals of the United States for the Ninth Circuit.

Dated this 15th day of June, 1951.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed June 15, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME
TO FILE APPEAL

Libelant and Appellant, Oregon-Washington Bridge Company, having moved the Court that it be granted an extension of time to and including August 25, 1951, within which to prepare and file its record in the Circuit Court of Appeals for the Ninth Circuit and the Court having considered the files and records herein and now being fully advised, advised,

It Is Hereby Ordered that libelant and appellant be and it hereby is granted additional time to and including August 25, 1951, within which to prepare and file its record on appeal in the Circuit Court of Appeals for the Ninth Circuit at San Francisco.

Dated this 10th day of July, 1951.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed July 10, 1951.

[Title of District Court and Cause.]

ORDER TO SEND EXHIBITS
TO COURT OF APPEALS

It appearing that certain exhibits were received by the Court as a part of the evidence presented by the various parties at the trial of the above captioned matter and libelant having requested in open court that these various exhibits be made a part of the record on appeal to the United States Court of Appeals for the Ninth Circuit in San Francisco, and the Court being fully advised.

It Is Hereby Ordered that any and all exhibits offered in evidence by the various parties at the trial of the above-captioned matter and admitted by the Court at said trial be made a part of the record on appeal to the United States Court of Appeals in San Francisco.

Dated this 6th day of August, 1951.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed Aug. 6, 1951.

[Title of District Court and Cause.]

DESIGNATION OF RECORD AND
PRAECIPE FOR APOSTLES ON APPEAL

To Lowell Mundorff, Clerk of the United States
District Court for the District of Oregon:

Request is hereby made that the record on appeal
in the above-entitled cause to the United States
Court of Appeals for the Ninth Circuit shall in-
clude the following:

1. Libel in Rem and in Personam;
2. Libelant's Stipulation for costs;
3. Claims of owners;
4. Answer of respondents and claimants;
5. Stipulation for costs;
6. Order that Erskine Wood has withdrawn as
Proctor for Russell Family, Inc., and Crane Barge
#25 and that T. S. White be substituted;
7. Stipulation for filing of Intervening Libel by
Russell Family, Inc.;
8. Order for filing of Intervening Libel by Rus-
sell Family, Inc.;
9. Petition and Intervening Libel in Rem and
in Personam by Russell Family, Inc.;
10. Intervening libelant's Stipulation for costs;
11. Answer of libelant to Intervening Libel filed
by Russell Family, Inc.;
12. Testimony taken on behalf of all parties, to-
gether with all exhibits of all parties admitted by
the Court;
13. Cost Bill of Russell Family, Inc.;

14. Libelant's exceptions and objections to the proposed findings, conclusions and decree;

15. Findings of fact and conclusions and final decree;

16. Respondent's cost bill;

17. Notice of appeal;

18. Petition for appeal;

19. Order allowing appeal;

20. Appellant's assignment of errors;

21. Bond on appeal;

22. Order proving bond and staying execution;

23. Motion and order extending time;

24. Designation of Record and Praecipe for Apostles on Appeal.

Dated at Portland, Oregon, this 19th day of July, 1951.

/s/ H. LAWRENCE LISTER,
Of Proctors for Oregon-Washington Bridge Com-
pany, Libelant.

Service acknowledged.

[Endorsed]: Filed July 19, 1951.

[Title of District Court and Cause.]

DOCKET ENTRIES

1950

- Sept. 11—Filed Libel in rem and in personam
- Sept. 11—Filed Libelant's stipulation for costs
- Sept. 12—Issued 2 warrants of arrest and monition
to marshal
- Sept. 12—Issued monition to marshal
- Sept. 18—Filed monition with marshal's return
- Oct. 28—Filed claims of owners
- Oct. 28—Filed claimants' stipulation to abide by
and pay decree
- Nov. 22—Filed answer of respondents and claim-
ants
- Nov. 27—Entered order setting for pre-trial con-
ference Jan 2, 1951 & for trial Jan. 9, 1951
- Dec. 8—Filed 2 warrants of arrest and monition—
executed
- Dec. 22—Entered order that Erskine Wood has
withdrawn as proctor for Russell Family,
Inc., & Crane Barge #25 & that T. J.
White be substituted
- Dec. 22—Filed & entered order cancelling stipula-
tion of Oct. 27, 1950 & allowing libelant
to proceed against barge
- Dec. 22—Filed stipulation to abide by & pay the
decree, substituted for stipulation dated
Oct. 27, 1950
- Dec. 27—Filed stipulation for filing of intervening
libel by Russell Family, Inc.
- Dec. 27—Filed & entered order for filing of inter-
vening libel by Russell Family, Inc.

1950

- Dec. 27—Filed petition and intervening libel in rem and personam by Russell Family, Inc.
Dec. 28—Filed Libelant's stipulation for costs
Dec. 28—Filed praecipe for issuance of process
Dec. 28—Issued warrants of arrest and monition to marshal
Dec. 28—Issued monition to marshal

1951

- Jan. 3—Filed answer of libelant to intervening libel filed by Russell Family, Inc.
Jan. 5—Entered order striking from trial calendar of Jan. 9, 1951
Jan. 15—Entered order setting for trial on Jan. 30, 1951
Jan. 18—Entered order resetting for trial on Jan. 25, 1951
Jan. 25—Record of trial before court
Jan. 26—Record of trial. At close of libelant's case Resp. Crane #25 moves for dismissal & for non-suit. Taken under advisement. Resp. then moves for order allowing motion for non-suit to be withdrawn—order allowing motion
Jan. 26—Order allowing libelant to Feb. 5, to file brief. Resp. to Feb. 14, to answer and libelant to Feb. 20, to reply
Feb. 5—Filed libelant's memorandum
Feb. 12—Record of oral opinion
Feb. 13—Filed memorandum of cross-libelant Russell Family, Inc.

1951

- Feb. 16—Filed notice to tax costs
- Feb. 16—Filed cost bill of Russell Family, Inc.
(Costs taxed at \$30.00)
- Feb. 20—Filed libelant's exceptions and objections
to Findings, Conclusions and Decree
- Mar. 5—Filed and entered Findings of Fact and
Conclusions
- Mar. 5—Filed and entered Final Decree
- Mar. 5—Entered judgment in lien docket
- Mar. 5—Filed cost bill of respondent
- Mar. 19—Filed monition—unserved
- Mar. 19—Filed warrant of arrest and monition—
unexecuted
- June 4—Filed notice of appeal by libelant (served)
- June 4—Filed petition for appeal
- June 4—Filed and entered order allowing appeal
- June 6—Filed appellant's assignment of errors
- June 7—Filed bond on appeal
- June 15—Filed and entered order approving bond,
and staying execution
- July 10—Filed and entered order extending time
to August 25, 1951, to file transcript of
record

United States District Court, District of Oregon,
in Admiralty

No. Civ. 5749

OREGON-WASHINGTON BRIDGE COMPANY,
Libelant,

vs.

TUG "LEW RUSSELL, SR.," and CRANE
BARGE No. 25 in Rem,

and

RUSSELL TOWBOAT AND MOORAGE COM-
PANY, Owner, Tug and Barge,
Respondents.

PROCEEDINGS

Appearances

GRAY & LISTER,
H. LAWRENCE LISTER,
Attorneys for Libelant;

WOOD, MATTHIESSEN & WOOD,
ERSKINE WOOD,

Attorneys for Respondents, Tug "Lew Rus-
sell";

WILLIAM F. WHITE,
Attorney for Crane Barge No. 25.

The above-entitled cause came duly on for trial
before the Honorable Gus Solomon, Judge of the

above-entitled Court, on Thursday, the 25th day of January, 1951, beginning at the hour of 10:00 o'clock a.m., at the United States Court House, Portland, Oregon.

The proceedings follow:

The Court: Are the parties ready in the case of Oregon-Washington Bridge Company, Libelant, versus Tug "Lew Russell, Sr.," and Crane Barge No. 25 in rem, Russell Towboat and Moorage Company?

Mr. Lister: Libelant is ready, your Honor.

Mr. Wood: Yes.

Mr. White: Yes, your Honor.

The Court: Mr. Lister, are you ready to proceed?

Mr. Lister: Ready, your Honor. I would like to at this time add to that specification of negligence to Article IV, to the effect that the additional negligence in failing to sound any signal of any kind and particularly the signal required by Part 203 of the Bridge Regulations for the Columbia River applying to this particular bridge.

The Court: Have you got that specification written out?

Mr. Lister: I haven't written it out, if your Honor please.

The Court: Mr. Wood, any objection?

Mr. Wood: No, I don't think there is at this time.

The Court: All right, amendment may be allowed. Will you write it out and hand it to Mr. Wood and Mr. White and give me the original?

Mr. Lister: Yes. If your Honor please, the Oregon-Washington Bridge Company on June 13 and prior thereto, 1950, owned and operated a bridge across the Columbia River known as the Hood River-White Salmon Bridge. On the day before some representative [2*] of the Russell Towboat and Moorage Company called and told the operator of the bridge that equipment would be coming through around eight or eight or eight-thirty the morning of June 13th and asked them to be ready to raise the draw of this bridge. The drawspan is in the center or middle of the river, and I think it is some 264 feet long. The arrangements were made to open the bridge at the time specified, and the regular bridge tender, a Mr. Adams, called an electrician, a Mr. Benson, from Hood River who was ready to stand by and to render assistance, if any needed, in opening this draw at the time the tug and its tow showed up. It did not show up at the time indicated, but around eleven or eleven-thirty Mr. Adams saw the equipment coming up the river toward the bridge, and he called Mr. Benson from Hood River, and Mr. Benson came over to the bridge, Mr. Benson, the electrician.

When the tug and its tow was some quarter of a mile down the river these men started to do the preliminaries to lifting the drawspan and making way for the tug and its tow. Now one part of the tow was a crane barge which had a boom that extended some distance in the air, and this boom is the only part of the equipment that would not have gone

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

under the bridge in its normal position; however, everything went along as it was contemplated until the span had got up some 13 feet above its normal position when the bridge is in use for traffic, when, all of a sudden, without any warning to the operator of the bridge, [3] the power failed, the power being supplied by a Public Utility District on the Washington side of the river. Immediately on discovering there was no power to raise the bridge higher, Mr. Adams, the operator of the bridge rushed out and signaled to the oncoming equipment that—tried to stop them, but there was no change in the forward motion so far as could be ascertained from the bridge, and the tug and its tow came on, and the end of this boom struck against the supporting member on the down-side of the bridge, I think they call it the cord in technical terms, and damaged this cord and also destroyed some of the supporting members and put the bridge out of commission.

It would have taken very, very little lowering of this boom to have missed this bridge entirely. As we will show, it could have been lowered and gone under the bridge without raising the span at all, but, at any rate, the boom did run into the lower part of the bridge, and it eventually backed out, and after the power was restored the bridge was raised on up higher. In other words, there was nothing wrong with the equipment on the bridge of any kind even after this wreck, and as soon as the power was put back on, without any repair, I mean, any change in the bridge's equipment, the span was lifted. In other words, there was no failure or fault on any

of the bridge in any way that caused this stopping.

Now the larger part of the use of this bridge was by heavy equipment, sand and gravel trucks and what not, and after [4] the damage was done the bridge was soon put back in condition that light traffic could move back and forth across it, that is, passenger cars, home-loaded trucks, but during a period, I think, of 31 days or thereabouts, it was necessary to keep heavy traffic off of the bridge, loaded trucks and such so Mr. Chandler who is the President and chief stockholder in the Oregon-Washington Bridge Company had a check made, and to the best of his ability he estimated that he lost about \$100 a day in revenue—this is a toll bridge—while this bridge was unfit for use by heavy traffic. The temporary repairs have been made to the bridge at a cost of some \$3,811.13, and it is estimated that it will cost about \$23,710 to put the additional repairs to put the bridge back into its original condition or into the same condition it was before this accident happened. A large part of this cost is made necessary because they have to raise—they have to put something under the center of this lift span and bring it up to a little additional height or hold it a little higher than it is at the present time in order to put what they call the necessary camber in this bridge. Now the camber is that, as I understand it, is the name for a little arch that is necessary to be carried in a bridge, particularly a bridge of this length and description, in order to make it safe for use and sufficiently strong to serve its purpose.

So we are asking here that the Company recover

moneys put out on these temporary repairs and for the loss of use and [5] for the additional cost of putting the bridge back into the condition it was prior to this accident, which, we contend, was caused by the negligence of the operator of the tug in not seeing that the bridge was high enough that it would clear his equipment before he went under and in moving up river, as far as we could see, without any decrease in speed and in not having his equipment under control and failing to lower this derrick and in failing to give the signals.

The Court: When should he have lowered the derrick?

Mr. Lister: What is that, please?

The Court: When should he have lowered the derrick?

Mr. Lister: Well, as far as we are concerned, at any time before he came to the bridge.

The Court: Isn't that precisely the reason why be notified the bridge that they were to lift the span?

Mr. Lister: That's right.

The Court: That the derrick was high, was not lowered?

Mr. Lister: That's right.

The Court: Well, you state it was negligence on him to call the bridge——

Mr. Lister: Well, your Honor, unless he was willing to wait there until he got an affirmative signal to come on, that the bridge was high enough to clear it, if he didn't want to do that, if he wanted to come through there and take his chances, then he could have done it by lowering this boom and have

gone [6] under this bridge without having the bridge removed from its original position. If he was going to take the chance of coming on up this river without having an affirmative signal from the bridge that there was safe clearance, then he should have lowered the boom, which he could have done, and gone under the bridge without having it moved from its original position, or it would have easily cleared the bridge in the position it was at the time of the accident.

The Court: Just as a matter of interest, do they pay anything for having the bridge opened?

Mr. White: No, I think not.

The Court: You may proceed.

Mr. Wood: Mr. Lister stated the case substantially, and I will add a few comments. The owner of the bridge, apparently, did not maintain a bridge tender constantly there so the practice is when any navigator or towboat company wants to go through the bridge they give notice in advance, 12 hours notice in advance, and then the bridge owner has his bridge tender come out on the bridge and take a position there and be ready to open the draw as the two approaches of which he has been notified. Now that was all done in this case. The towboat company gave 12 hour notice in advance from Vancouver where its headquarters were that it would be coming up the river with this tow, and so the bridge tender whose name was Adams was out on the bridge expecting the tow and was ready there as it [7] approached.

When the tug and the tow got within a quarter

of a mile downstream from the bridge—this is the White Salmon-Hood River Bridge—it stopped its engines and waited there until the bridge tender lifted the draw. The bridge tender did lift the draw, and the draw came to a stop, as it now turns out later, due to this power failure. But, of course, the people on the tug and tow didn't know that. They assumed when it came to a stop the bridge tender, in his judgment, had lifted it high enough and it was safe for them to come on; therefore, the bridge lift now having been raised and come to a stop, and, apparently, the man on the boat thought it was plenty high enough to go under because it's not easy for a man lower on the water on a small tug to judge nicely whether the bridge is exactly high enough or not. He is at a distance of a quarter of a mile away and is looking up toward it, but he is not looking at it on a level where he can measure it nicely, and he doesn't have the opportunity because of that difference in there, so it is up to the bridge tender on the bridge to make that judgment, and when he lifts the draw and comes to a stop the vessel has the right and assumes it is all right to come on.

That is what happened here. The tug and tow, having seen the draw lifted and come to a stop, then proceeded slowly up at a speed of perhaps a mile and a half an hour through the draw, and they almost went through the draw. I was glad to hear Mr. Lister say that if we had lowered this derrick just a little [8] bit we would have gone through safely because the converse of that is that if they

had raised the draw lift just a little bit more we would have gone through safely, and the man on the boat couldn't judge until the accident practically happened that the draw was not high enough. It was so narrow a margin that it looked to them perfectly safe to proceed, which they did.

Now the derrick was at an angle, and it had a reel on the end of it, and it hit the railing of the bridge and rode up over the bridge a little way and did some damage, but I mention that to show how narrowly it was to clearing it entirely. It hit the railing of the bridge and rode up a little. The bridge had been raised—well, I don't know really, that's up to the judgment—but I think three or four feet more, everything would have been all right. I make mention of that again to show that the tug cannot be held to nicely judge whether it can go under or not. That is up to the bridge man.

Now I didn't make any objection to Mr. Lister's belated amendment here charging the tug with negligence for not blowing the whistle to the bridge as required by regulations because the only purpose of the whistle is to ask the draw lift tender to lift his draw. That is all it is for. Of course, that is immaterial here because the bridge tender saw the tug waiting for the draw to be lifted and lifted it, so that is clearly of no moment. Mr. Lister also said that we should have waited for some signal, some whistle from the bridge that it was safe to [9] proceed, or some signal of some kind. There is nothing in the regulations that requires that, and the rule of law is, as I have stated, that when the

bridge is lifted and comes to a stop the presumption is it is safe to go through, and the tug is entitled to rely on that presumption.

Now, I think that is in brief our case. Well, I should explain a little more the three-party relationship here. The bridge is suing the tug and the barge and their owners for \$31,000 damages. I represent the tug only. I do not represent the barge or its owners. I represent the tug and its owners. Mr. White represents the barge and its owners. Now, as far as my client is concerned, I am not asking damages of anybody. I am merely resisting Mr. Lister's claim of damages against my client; therefore, as far as my client is concerned, it is immaterial to me whether this is held to be a case of no negligence on our part or an inevitable accident. I think, however, it is plainly a case of negligence on the part of the bridge, under all of the authorities, and on that phase of it Mr. White will press a claim for damages against the bridge because his barge was damaged through the fault of the bridge. Do you wish to say anything?

Mr. White: Just a little comment.

Mr. Wood: Yes, I think that's all we have to say at this time. Mr. White has something.

Mr. White: If the Court please, I concur in Mr. Wood's [10] statements, generally, on the liability and the factual situation. I want to state that the owner of the Crane Barge 25, is the Russell Family, Inc., who is the intervening libelant here and who is claiming from the bridge approximately 33 or 34 hundred dollars for damages. I might say

that Crane Barge 25 is an LSM type vessel with the engines removed and is a steel barge on which there has been erected a large crane, and in the course of this journey up the river on top of the deck of Crane Barge 25 was a little landing craft called the Laura Louise, and it was a little self-propelled ramp type barge or craft being taken up to McNary Dam together with the LSM crane barge for use by the contractors up there.

The landing craft was as cargo on top of the crane barge 25, and the boom was lowered within two inches from striking this cargo, that is, this landing craft, and secured there, and our position on liability is identical with Mr. Wood's position. We have sued the bridge only for the reason that in our investigation of the facts there is negligence there, and we are entitled to recover.

The Court: Call your witnesses.

Mr. Lister: Call Mr. Adams. [11]

OSCAR HERMAN ADAMS

called as a witness in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lister:

Q. Where do you live, Mr. Adams?

A. Hood River.

Q. What are you doing now?

A. I am toll collector on the Oregon-Washington Bridge at Hood River.

Q. What were you doing in June, 1950?

(Testimony of Oscar Herman Adams.)

A. Collecting toll on the bridge.

Q. How long had you been doing that type of work prior to June, 1950?

A. Oh, better than two years.

Q. What hours did you work, Mr. Adams?

A. Well, I was working from six in the morning until two in the afternoon.

Q. Who else—did you have any other one working on the bridge?

A. Yes, there was four of us working three different shifts.

Q. What are the facts as to whether or not there was an attendant there 24 hours a day?

A. That's right.

Q. Now do you remember this occasion when this accident happened?

A. I do. [12]

Q. That has been described here?

A. Yes, sir.

Q. The information given that the equipment was coming up the river was given to you personally or to some of your fellow workers?

A. No, it was given to me personally.

Q. What did you do?

A. Well, about eight o'clock, I should judge, in the evening, of the 12th of June they called me from Vancouver that they were, that there was a boat coming through, this Russell Towboat Company was coming through with a boom on a barge, and they didn't think I had quite clearance enough to get under the bridge and wanted to know if I

(Testimony of Oscar Herman Adams.)

could have it up about eight or eight-thirty in the morning.

Q. Were you on duty at that time?

A. I was.

Q. I thought you said you worked——

A. No, when they called me they called me at my home.

Q. I see. Why did they call you rather than the man who was on duty?

A. They possibly called there, and then they told them to call me.

Q. Oh, I see. All right then, what did you do then, Mr. Adams?

A. Well, instead of at eight-thirty to come through, it was possibly eleven when I saw them coming, oh, from a mile and a [13] half to two miles down the river.

Q. What did you do then?

A. I called Mr. Benson, the electrician.

Q. Who, please? A. Mr. Harold Benson.

Q. Where was he?

A. He was at his home.

Q. Where was that?

A. It is possibly a mile out of Hood River south.

Q. All right, what was his connection with the bridge?

A. Well, he got there, I should judge he got there when they were within, oh, three-quarters or half a mile from the bridge.

Q. All right, what was his connection with the bridge? Why did you call him?

(Testimony of Oscar Herman Adams.)

A. Well, we always had him stand by as he was an electrician, in case of trouble so we——

Q. When had you last raised the bridge prior to June 13, 1950?

A. On a Sunday before the accident happened we raised the bridge for a trial test.

Q. I believe June 13 was on a Tuesday. Would that be——

A. That's right.

Q. And Sunday would be the 11th; is that correct?

A. That's right.

Q. Was Mr. Benson present when the bridge was raised? On June 11th? [14]

A. That's right, yes, sir.

Q. What is the fact as to whether or not Mr. Benson has been present on other occasions when the bridge has been raised or lowered?

A. Yes, sir, we generally always call him, always do.

Q. Can you tell us about how long this liftspan was, Mr. Adams?

A. How long it is?

Q. Yes?

A. Oh, it must be—I wouldn't know. I would just have to guess at it. I wouldn't know exactly.

Q. Describe to the Court what is the——

The Court: Have you got some pictures? Let's see the pictures.

Mr. Lister: What is that, your Honor?

The Court: You have got some pictures there?

Mr. Lister: I would like to have these marked.

(Thereupon, photographs were marked Libellant's 1 through 11 inclusive for identification.)

(Testimony of Oscar Herman Adams.)

The Court: Any objection to those pictures, Mr. Wood?

Mr. Wood: No, I don't think so. I have not looked at them yet.

The Court: All right.

Mr. White: When was this picture taken, Mr. Lister, when they proceeded, when the second half of the bridge was repaired, or was this right after the accident, or what? [15]

Mr. Lister: This was right after the accident.

The Court: Which picture are you referring to, Mr. White.

Mr. White: Exhibit 1 for identification.

Mr. Wood: There is no objection to them.

Mr. White: Do you have an extra copy of that large one, Mr. Lister?

Mr. Lister: We have one very much like it, Mr. White. I am not sure it is identical.

The Court: Mr. Lister, the witness has the pictures. You may proceed.

Q. (By Mr. Lister): Mr. Adams, will you describe—where is the toll house on the bridge.

A. It is in the center of the drawspan.

Q. Does it show on some of those pictures there?

A. Yes, sir.

Q. Could you look at the number on one of them and show where it is?

A. No. 8, Exhibit 8.

Q. Does that show the toll house?

A. Yes, sir, that shows the toll house.

Q. Where did you stay with regard to the toll house? A. Where did I stay?

(Testimony of Oscar Herman Adams.)

Q. Yes, would you stay there, normally be there when you were working on the bridge?

A. That's right. [16]

Q. When Mr. Benson came to the bridge on the morning of the accident, where were you then?

A. I was in the toll house.

Q. What did he do?

A. He went across the bridge on the Washington side and turned around, but he didn't turn on the bridge, and parked his car just off the span on the north side of the span.

Q. Then what was done?

A. He came over to the toll house and I says, "Well," I says, "they are getting pretty close. We might just as well start to raising the span." He says, "Okeh," and so I went to the west end of the span, and he went to the north and untied the ropes that held the cables to keep the wind from whipping them against the bridge.

Q. When you said that you went to the west end and he went to the north, if he went to the north wouldn't you be going to the opposite end or to the south? A. Yes, I went to the south.

Q. Would you tell the Court a little bit more what you mean by—what are those cables that you mentioned?

A. Well, they are—I should judge they are wire, the cable that runs from the bottom of the span, and they hang in a loop, and the wind whips them back and forth, and we tie them with ropes to keep them from whipping against the bridge.

Q. Aren't those the electrical equipment? [17]

(Testimony of Oscar Herman Adams.)

A. I think they are.

Q. That carry the current?

A. That's right.

Q. Then what else did you do; what is the next thing you did?

A. Well, I went over, and he run on up into the control house.

Q. Where is the control house?

A. We lowered the gates first.

Q. What is that?

A. Put the signal out, lowered the gate to stop the traffic, or I did that before we went out of the toll house.

Q. How do you do that, Mr. Adams?

A. Oh, there is controls there in the toll house that does that, levers.

Q. You have electrical switches, don't you, that you engage? A. That's right.

Q. And those switches cause a sign to come down on each end of the—or of the liftspan?

A. Yes, sir.

Q. Warning traffic, and then you have other switches that put the gate down on each end?

A. That's right.

Q. Now are those the ones you are referring to?

A. That's what I was referring to, yes.

Q. You say those are operated from the toll house? A. From the toll house. [18]

Q. Did you throw those switches before you went out and untied these ropes, or afterwards, or do you remember? A. Before.

(Testimony of Oscar Herman Adams.)

Q. Then when you came back where did you then, where did you go then?

A. We went up into the control house upstairs.

Q. Where is the control house?

A. It is possibly 25 or 30 feet up just off of the span on the Washington side, on the north end of the span.

Q. To me then that would be the northerly side of the bridge; am I correct? A. That's right.

Q. And with regard to the deck of the bridge, where is this toll house? Is it level with the deck of the bridge, or is it—— A. The toll house?

Q. Yes,—I mean the control house.

A. Yes, it's level with the bridge span, not on top. It is probably 25 or 30 feet above the toll house. There are steps to go up there to it.

Mr. Wood: Is there a picture of it?

The Witness: I don't think there is. No, there is no picture of the control house here. No,—yes, there possibly is here in this large one. Yes, you can see it.

Mr. Lister: Referring to exhibit number what?

A. No. 1. [19]

Mr. Wood: I am talking about the control tower, not the toll house. Does that picture show?

The Witness: The one at the end is the control house, the one that you see up off of the roadway.

Mr. Wood: Go ahead.

Q. (By Mr. Lister): You say it is some 25 feet above the——

(Testimony of Oscar Herman Adams.)

A. I should judge 25 or 30 feet above the roadway.

Q. All right, then did you go up there—did Mr. Benson go up there, too? A. Yes, sir.

Q. Did you both go up there at the same time?

A. That's right.

Q. What did you do now from up there?

A. Well, there was a couple of ropes up there we had to untie. He untied one, and I untied the other. Then we went into the control house.

Q. What is located in the control house?

A. That's where the switches are to raise the bridge, the controls.

Q. Switches, what do the switches relate to, Mr. Adams?

A. Well, the first thing we do, we turn the power on.

Q. Do what?

A. There is a power switch. We turn that on, and there is a light there that lights up when it comes on, and then there is another switch we switch to bring out the interlocks. [20]

Q. To do what?

A. To bring out the interlocks. There is interlocks that holds the bridge after it is down, and there is a motor that brings those out so we can raise the span.

Q. As I understand, your interlock is a device that goes from the stationary part of the bridge into the liftspan on each end and holds it solid when it is in a stationary position?

(Testimony of Oscar Herman Adams.)

A. That's right, yes, sir.

Q. You say those interlocks were removed by means of a motor? A. Yes.

Q. Which is controled from the switch in the control house; is that what you said?

A. That's right.

Q. Then what did you do?

A. Well then, we—then I throwed the switch, the lever there. There is a lever there that you, that niches in with the knob on it that you can bring it up as fast as you want to that has just four or five speeds there, and you would start first notch until it starts raising. Then we let it sit there until the bridge is up and it's up to where we want it.

Q. I think you described it as being something like an old control on a street car?

A. Streetcar, that's right.

Q. You operate it much the same way as the motorman with the old streetcars? [21]

A. That's right.

Q. Now, what, if anything, is there there to indicate the manner in which the machinery is operated, Mr. Adams?

A. Well, there is a screw there, a picture of a bridge that shows if the bridge is out of tilt, and there is other instruments there to tell you the height of the bridge. I think that's all.

Q. Do you know how the bridge is raised? It is my understanding there is a motor to raise each end of this liftspan; am I correct in that understanding?

A. That's right, yes, sir.

(Testimony of Oscar Herman Adams.)

Q. Do both of those motors operate off of the same switch?

A. Yes, sir, no, I don't know now about the—I couldn't tell you.

Q. Well, you only had one control for it to move, as I understand it, in order to start the bridge raising?

A. That's right, just one control.

Q. From the normal position into the air, is that correct?

A. Yes, that's right.

Q. All right. You said there were certain indicators there. Did any of those indicators show anything abnormal in the movement of the bridge at all?

A. Not a bit.

Mr. Wood: Will you speak a little louder, please?

The Witness: Yes, sir, no, there was nothing there to indicate [22] that anything was wrong whatever.

Q. (By Mr. Lister): You have described that there is a device which shows you whether the bridge is coming up on level or whether one end is higher than the other; is that correct?

A. Yes, sir, that's correct.

Q. Then how high did the bridge go before anything out of the ordinary happened, Mr. Adams?

A. Well, I think the indicator said 13 and a half feet, to be accurate.

Q. And, in the meantime, what was this equipment doing, this tug and its tow?

A. They was coming right along up the river.

(Testimony of Oscar Herman Adams.)

Q. You say that you first saw them a mile and a half or two miles away?

A. Yes, sir, when I first saw them.

Q. From that time on were you conscious of the position of this equipment until the accident happened? A. I was.

Q. Did you at any time see any evidence that the speed of this equipment was changed or accelerated or decreased?

A. From where I was at I couldn't tell if there was any difference. It was moving right along.

Q. Will you describe—did you see a wake?

A. I could see the waves, yes, from the front end of the barge.

Q. Did that decrease at any time? [23]

A. Not that I noticed, not once.

Q. Now can you tell us about where this equipment was when the bridge stopped moving upward, when the liftspan stopped moving upward?

A. Yes, I should judge around from four to six hundred feet from the bridge.

Q. Four to six hundred feet? A. Yes.

Q. What did you do then?

A. Well, we tried to work the switches there to see what was the matter, and the power was off, and I tried to blow the whistle to stop the barge, and it wouldn't blow, so I ran outside and waved and hollered, but evidently, he never saw me. I could see him, but he didn't see me. There was some bridge members there that it was pretty hard or impossible to see me, but if he had looked he could have saw me, but he didn't because I could see him looking

(Testimony of Oscar Herman Adams.)

up and watching the end of the boom.

Q. How many men were there on this equipment?
A. Two that I saw.

Q. When you say you ran out, where did you go? Can you show on one of those exhibits, one of those pictures, where you went when you tried to give a signal?
A. I don't think——

Q. Is that one that is the picture of the control? Could you [24] show on that where——

A. I couldn't. I can tell you just about, but I couldn't——

Q. Well, with regard to being up or downstream, is that control on the downstream side or the upstream side of the bridge? Is the control tower on the downstream side or the upstream side, or is it right in the middle of the bridge. Where does it set?

A. I would say it sets right across the bridge, right lengthways across the bridge, the control house does, on the north side.

Q. It goes across entirely the full width of the bridge; is that it?

A. That's right, yes, sir.

Q. Well now, where did you go and where were you standing when you were signaling to this equipment that the bridge was stuck?

A. I was on the east end of the, of this here control house. There is a platform, and you can walk out, and I couldn't go around the other way on account of it was dangerous. There was wiring around there. I didn't really have time to run clear

(Testimony of Oscar Herman Adams.)

around the other side if I could have got around, and I waved there from that platform on the upstream side of the bridge.

Q. Well, would the control house be between you and the operator of the tug?

A. Well, it would be, but I was—the platform was far enough out there so that you could get out far enough so that you could see down the stream of the river.

Q. Which side is it, north or south, where this platform is? [25]

A. It would be on the south side.

Q. That is the Oregon side?

A. Well, the platform is on the east side, but it extends out on the south side of the building far enough there, oh, four or five, six feet.

Q. So that where you were standing was a platform?

A. That's where I was standing when I waved and hollered.

Q. What did you wave? A. My hat.

Q. What part of the tow came in contact with the bridge, Mr. Adams?

A. The end of the boom lacked about five or six feet of clearing or of going under the bridge.

Q. Where did it hit the bridge?

A. It hit it just right at the north end of the toll house, just missed the toll house. It scraped it.

Q. The toll house, that's on the downstream side of the bridge, is it, you said?

A. That's right, yes, sir.

(Testimony of Oscar Herman Adams.)

Q. What part of the bridge was involved now and what received the brunt of the blow?

A. Well, this boom going east, it was sloped like this (indicating), and it just went over the railing of the bridge, and with the weight, the speed he was going, it shoved the boom right under the —over the railing and clear across the bridge [26] under the members on the other side, and the weight of the barge pushing up against there made a pry out of this boom, and it just snapped those steel girders, whatever you call it, snapped them off like they was toothpicks.

Q. What did it do to that main supporting member? I think you called it a cord on the downstream side?

A. Well, it bent that, kind of cracked it underneath there, weakened it considerably.

Q. How did they disengage this equipment from the bridge?

A. How did they disengage it?

Q. How did they get it loose from the bridge?

A. Well, they had quite a little time. There was a big block on the end of this boom, I suppose it is to weight it down, and an enormous big block. It had come unhooked and dropped down, and they had quite a time pulling back. Of course, to get the barge, to get the thing loose, kind of wedge in there, but they finally pulled it back, and the block had done considerable damage. When it come up it bent a lot of things, those tubings they had that the wiring runs through.

(Testimony of Oscar Herman Adams.)

Q. How long was it until they get the crane disengaged from the bridge?

A. Oh, it was possibly ten minutes before we got the thing cleared up.

Q. You have seen that picture that is now marked for identification No. 1. Does that show the equipment the way it stood after it [27] pulled off?

A. Yes, sir, after it pulled off.

Q. Yes? A. Yes, sir.

Q. What did you do then to determine what had caused this bridge to stop moving?

A. I think Mr. Benson, the electrician, called the—he checked things over. He said, "There is no power," he says, "the power is off." So I think he looked, checked the fuses there in the control house, and they were all okeh, and so he called the PUD at White Salmon, Klickitat County, and told them the power was off the bridge.

Mr. White: I object to this testimony unless it is shown that this man was present. This may be something Mr. Benson told afterwards. I am not clear. Was it at the scene?

The Court: Is there any dispute about the fact that the power was off?

Mr. White: We don't know.

Mr. Wood: We don't know.

Mr. White: We require them to prove it.

The Court: Objection is sustained to this. Is Mr. Benson here?

Mr. Lister: Yes, he is here, your Honor.

Q. (By Mr. Lister): What did you do, Mr.

(Testimony of Oscar Herman Adams.)

Adams, I will ask you what did you do, what was done there in your presence toward determining what caused the—— [28]

The Witness: After the accident?

Q. Yes, at any time.

A. Well, I crawled out over the bridge, went down, helped get this block off and then came back up and then it was one o'clock before the power was turned on again, before they got to put a fuse in over at the plant or where it had blowed out.

Q. What is the fact as to whether or not at any time any of the equipment at or near the bridge was found to be out of order in any way?

A. The bridge, no, there was nothing wrong with the bridge, only——

Q. You say at one o'clock the power was restored?

A. That's right.

Q. What did you do then?

A. We lowered the bridge and let traffic through. The bridge went down normally, and we let traffic through, and after that cleared up I sent or telephoned over to the Nichols Boat Works and had them send a boat over to the barge where they had tied it at the moorage, told them to come on through, raised the bridge. I raised the bridge 30 feet, and they went under.

Q. Did you do anything at all in the way of repairing or renewing any of the apparatus on the bridge or connected with the bridge?

A. Nothing.

Q. Did you lower this bridge, this span, into

(Testimony of Oscar Herman Adams.)

position without [29] changing of the wiring or the switches or fuses or anything in connection with the bridge? A. Yes, sir, I did.

Q. Did you make the lift without having changed or renewed any of the equipment on the bridge?

A. No, sir, nothing was changed at all.

Q. You said, "No, sir." Do you mean that you didn't—did you have to change anything before?

A. No, sir, nothing.

Q. Did the bridge raise without any difficulty of any kind? A. It did.

Q. Now, during the time you have been working on the bridge had you ever at any time had any trouble lifting the span? A. I never did, no.

Q. What was the occasion for raising it on the Sunday before this accident happened?

A. Well, for a test. We always raised it at least once a month to test, to see that it would operate freely.

Q. Who was present when the test was made on the Sunday prior to June 13th?

A. Mr. Benson, Harold Benson.

Q. Do you always have him come down when you make a raising or lowering of the bridge?

A. We do, yes, sir.

Q. Did this vessel give any signal of any kind as it came up [30] toward the bridge?

A. No, sir.

Q. What, if any, lights are there on the bridge, Mr. Adams?

(Testimony of Oscar Herman Adams.)

A. Well, there is a light on each end of the span down on the concrete pier.

Q. What do you call it?

A. A red light on each end of the bridge at the concrete pier and then there is also a red light in the center of the bridge.

Q. Were those lights operating on that day of this accident?

A. They were operating until the accident happened.

Q. Well, were those lights controlled by the same current and fed the same current that lifted the span? A. Yes, sir.

Q. Until the current went off then would there be a red light showing to traffic moving up the river? A. Until, yes.

Mr. Wood: What?

The Witness: There would be a red light showing, yes.

Q. (By Mr. Lister): Until the power went off?

A. That's right.

Q. When the power went off you estimated this equipment was some four to six hundred feet downstream; is that right? A. Yes, sir.

Q. What would be your estimate of the speed at which it was moving at that time, Mr. [31] Adams?

A. Well, not familiar with the boats on the river, it would be pretty hard for me to estimate the speed he was coming, but I would say——

(Testimony of Oscar Herman Adams.)

Mr. Wood: I object to him estimating. He just said he was not qualified.

Mr. Lister: He didn't say he was not qualified.

Mr. Wood: He said it would be hard for anybody.

The Court: He said he is not familiar with the speed of boats on the river.

Mr. White: Then he is in no position to express an opinion, your Honor.

The Court: I think that's right. Objection sustained.

Q. (By Mr. Lister): Could you tell, Mr. Adams, about how much time elapsed from the time you noticed this equipment four to six hundred feet downstream until it hit the bridge?

A. Well, I would say not over two minutes.

Q. Do you know whether this derrick boom was lowered after the—was disengaged from the bridge there, Mr. Adams?

A. It was.

Q. How much did they lower it?

A. Oh, I would say they lowered it 10 or 15 feet after they backed off.

Q. Now what do you know about the movement of traffic—this accident happened on the 13th of June, didn't it?

A. Yes, sir. [32]

Q. And was the bridge—strike that—what, if any limitations were put on the traffic and use of the bridge subsequent to this accident?

A. You mean the amount of traffic?

Q. Did you let all types of traffic go back and forth across the bridge?

(Testimony of Oscar Herman Adams.)

A. No, we had to stop trucks, heavy trucks.

Q. How long did that continue?

A. Oh, I would say before we got it, probably 40 or 50 days, somewhere around in there, I wouldn't know exactly, but it was quite a while, I know, before we got it fixed.

Q. In fact, you didn't let loaded trucks go over there until the repairs had been made; is that correct?

A. No, no loaded ones or empty either.

Q. Did you make any effort to ascertain how many trucks were prevented from moving back and forth across the bridge?

A. I did our regular customers, yes, sir.

Q. Can you tell us what you found?

A. Well, there was a sand and gravel truck, Leadbetter sand and gravel trucks. He run three trucks across there, hauls sand and gravel, and we had to stop his outfit, and there was the dairy, two or three trucks of the dairy, Mayflower Dairy Company, went across. We had to stop them, and we had signs at each end to stop a lot of trucks that I had no way of record, I hadn't any record at all.

Q. Didn't you make an estimate and submit it to Mr. Chandler? [33]

A. I did, sir.

Q. At the time of about how many you figured that had—how much traffic you lost during the time the bridge was under repair?

Mr. Wood: I am going to object to this, your Honor, for this reason. He has mentioned two or three trucks of the Leadbetter Company, two or three trucks of the Dairy Company, and then he

(Testimony of Oscar Herman Adams.)

just said he had no way of keeping a record or estimating what other miscellaneous trucks might have crossed or not crossed. He just said he had no way of doing it.

The Court: Mr. Lister, I think that might be admissible if you could come in on a proper showing. You have not made that kind of a showing.

Q. (By Mr. Lister): You did, didn't you, at Mr. Chandler's request, try to estimate how many trucks? A. I did.

Q. Loaded trucks were stopped from going back and forth, and when you speak of those Leadbetter trucks, did they cross more than once during the day?

A. Oh, yes, they crossed sometimes, sometimes they crossed and paid \$40.00, \$50.00 in on the bridge a day.

Q. What do you charge for trucks?

A. Well, Leadbetter's trucks were a dollar a crossing each way.

Q. Whether they were loaded or empty?

A. Yes, sir. [34]

Q. And as I understand it, they did cross empty, and you saw them, didn't you? A. Yes, sir.

Q. And they didn't come back loaded, and you knew that if the bridge had not been restricted in use they would have come back; isn't that right?

A. We didn't allow them even to go across empty.

Q. Well then, how did you know—did you base that on what they had been doing?

(Testimony of Oscar Herman Adams.)

A. What they had been doing before the accident happened.

Q. I see, and prior to the time the accident happened these Leadbetter trucks would make from 30 to 40 trips back and forth across the bridge?

Mr. Wood: Oh, no, he said sometimes.

Mr. Lister: Well, you said 30 to 40 times; didn't you?

The Witness: I said sometimes it would run as high as \$50.00 a day we would take in from their trucks.

Q. (By Mr. Lister): All right, well then, what would be the average—what did you use in estimating the loss of use to Mr. Chandler?

A. Well, I just averaged up the crossings that they made previous to this accident.

Q. Well, was it the kind of work which they had been doing throughout the week that would take them back and forth substantially the same amount each day? [35]

A. Practically the same, yes.

Q. Just tell the Court what kind of work they were doing and what were they hauling?

A. They were hauling, they had their gravel pit and sand pit over on the Washington side, and they would go over there and haul it over to their mixer on the Oregon side.

Q. Was that a comparatively steady traffic back and forth?

A. That is steady business on the bridge, yes.

Q. Now you say that would run from 40 to 50

(Testimony of Oscar Herman Adams.)

dollars a day on the average? A. Yes, sir.

Mr. Wood: No, he didn't say that.

Q. (By Mr. Lister): What did you say?

A. I said it would run around \$50.00 a day.

Mr. Wood: If your Honor please, I want to object to that and call your Honor's attention to what he said before. He said it would go as high as 40 to 50 dollars a day. He was stating the maximum.

The Court: I am going to let it in, but I just want to say now that much of this testimony is absolutely immaterial, and some of it should have been agreed upon prior to the time that we came into court. I am just serving notice on you that this is the last time I am ever going to permit you to come into court without a pretrial order if this type of testimony is to come in because I don't like it. [36]

Mr. Lister: I am willing to do that, your Honor.

The Court: This is a matter that should have been agreed upon before.

Mr. Wood: Well, if your Honor please, I think I ought to state in justice to Mr. Lister we did have a pretrial conference, and the two of us, we couldn't agree on these damages because we didn't think they had the proof to substantiate it so we couldn't agree on it.

The Court: But, certainly, you can agree, Mr. Wood, as to whether or not there was a power failure. It would have been a very simple thing to call up PUD at White Salmon and find out at that time if the power had failed.

(Testimony of Oscar Herman Adams.)

Mr. Wood: I don't think there will be any dispute about that, your Honor.

The Court: Or as to whether or not the bridge was in good shape prior to the time and at the moment the power went out. That has been what the witness has been testifying to practically his whole time.

Mr. Wood: There is no dispute about the power failure. In fact, in our answer we admit it.

The Court: Mr. White insisted upon the evidence going on because he says, you are putting them on proof.

Mr. Wood: Well, Mr. White overlooked that. We have admitted it.

Mr. Lister: Well, Mr. Wood, are you—if your Honor please, [37] we have estimated that there was a hundred dollars a day for loss of use on this bridge, and we want to put on evidence to prove that, if they won't stipulate as to that some or some comparative figure.

The Court: Mr. Lister, you have not shown a basis for which this man can make an estimate.

Mr. Lister: If your Honor please, all he can show is what traffic went across from time to time and what didn't go across during the time the bridge was under repair. That's all he can show. It seems to me he was there, weren't you there all the time, Mr Adams?

The Witness: Yes, sir.

Q. (By Mr. Lister): You had been there for a long period of time before, hadn't you?

(Testimony of Oscar Herman Adams.)

A. That's right.

Q. You were there all the time the bridge was under repair, weren't you? A. I was.

Q. And you did try to keep in mind the traffic that went across during the repair as compared to that that had gone across before, didn't you?

A. I did, yes, sir.

Q. You say that this Leadbetter Company had trucks that moved back and forth?

A. Yes, sir. [38]

Q. And that prior to the accident you estimated they drove, no, how did you put that, as high as \$50.00, or what is your figure?

A. I would say as high as \$50.00.

Q. Can you give us what would be the average?

A. Well, there was days that they probably wouldn't go, wouldn't pay over \$30.00 in, I would say. I would say it would average \$40.00.

Q. All right. Now, during the time that this bridge was under repair did this Leadbetter equipment go back and forth at all?

A. No, not while it was being repaired.

Q. All right. Now what other equipment do you know about that went across regularly before the accident happened that didn't go back and forth during the time the bridge was under repair?

A. Well, these Mayflower Dairy trucks.

Q. How much, what would be the average?

A. Well, there was three trucks a day went over and back. That was \$1.00 a truck. That would be \$6.00 a day we lost there on the dairy trucks.

(Testimony of Oscar Herman Adams.)

Q. All right, what others do you know?

A. Well, there was the wood trucks, too. East-erly's wood trucks. He hauled four loads a day from over there.

Q. Would that be eight crossings or four crossings?

A. That would be eight crossings there. That would be \$8.00 on his wood trucks. [39]

Q. Can you mention any other specific equipment that habitually went across the bridge before and that didn't go across it during this time the bridge was under repair?

A. I can't think of any others, no, of our steady customers.

Q. You do remember making a memorandum, don't you, and submitting it to Mr. Chandler?

A. I did, sir. I might say, too, there was another outfit, the McGee Trucking Company, that hauled box shipments across to the Apple Growers Association in Hood River. There were large trucks, and we lost two trips of theirs over and back each day.

Q. Well, Mr. Adams, from your experience, at any time you were there and observing trucks going back and forth, what would be your best judgment as to the amount of loss of use which was sustained during the time this bridge was under repair?

Mr. Wood: I object to that. I think now he has stated all the facts he can remember. It is up to the Court.

The Court: I am going to let it in over the objection. Go ahead and testify.

(Testimony of Oscar Herman Adams.)

The Witness: You mean how much you think we actually lost?

Q. (By Mr. Lister): Yes, sir, how many—did you charge each truck that went across a dollar?

A. No, the large trucks, the larger trucks run as high as \$4.00.

Q. How many of those type of truck didn't cross during the time the bridge was under repair?

A. Well, there was some days there would be four or five trucks [40] crossing a day, and other days there wouldn't be any of those larger trucks.

Q. What would be the average?

Mr. Wood: Well, I object to that unless it shows some basis for making an average.

The Court: Mr. Lister, you had plenty of time before this trial to make a record of all of the truckers who passed before the collision who might pass after the collision, taking a comparable period for the prior years to find out.

Mr. Lister: If your Honor please, the reason it is not accountable, we will explain that a little later. The repairs on the road there between White Salmon—I mean the Columbia River Highway on the Oregon side, were such that it put an abnormal traffic across the bridge at this time, and it wasn't a fair comparison as to the average. That is the reason we cannot do it.

Mr. Wood: The way you have indicated.

The Court: Certainly, there ought to be some basis by knowing what was done before and after any comparable periods. You could have explained

(Testimony of Oscar Herman Adams.)

it, but I will let you ask the question to this witness.
Go ahead.

Mr. Lister: What was that last question, Mr. Reporter?

(Pending question read by the Reporter as follows: "Q. What would be the average?")

The Court: That they lost during the time the bridge was [41] down, how much a day?

The Witness: I would say from 80 to 100 dollars on trucks alone.

The Court: Are there any other questions?

Mr. Lister: You may examine.

The Court: We will take a five minute recess.

(Thereupon, at 11:30 a.m., a short recess was taken.)

The Court: Mr. Adams, will you resume the stand.

OSCAR HERMAN ADAMS

recalled, testified as follows:

Cross-Examination

By Mr. Wood:

Q. I will try to be rather brief, your Honor. Mr. Adams, you had been the bridge tender here for about three months before the accident had you not?

A. Manager, yes, sir.

Q. You had received word, you said, at least 12 hours in advance from Vancouver from the Russell

(Testimony of Oscar Herman Adams.)

Towboat Company that the tug and tow were coming up the river and with the boom?

A. I did.

Q. So that you knew you would have to lift the draw for that boom? A. I did.

Q. Now when the tug and tow got below the bridge, you saw them coming some two miles away, you said?

A. Yes, from a mile and a half to two miles, I should judge. [42]

Q. As they approached and got closer you lifted the drawspan—it isn't a drawspan; it's a liftspan, isn't it? A. Well, yes, it's a liftspan.

Q. How far away from the tug and tow were you when you started to lift the drawspan?

A. A quarter of a mile at least.

Q. Everything went right at first, didn't it?

A. Yes, sir.

Q. Then the bridge stuck due to the power failure after you had lifted it, you think, about 13 and a half feet? A. Yes, sir.

Q. May I ask how much you intended to lift it?

A. Thirty feet.

Q. Is that the limit of its lift?

A. No, it will go 80.

Q. Now when the thing stuck, how far do you estimate the tug and tow were below you then downstream?

A. Oh, I would say five or six hundred feet somewhere, four to six hundred.

Q. I don't know whether it makes a great deal

(Testimony of Oscar Herman Adams.)

of difference, but I have a statement here of yours that I will be glad to show you where you estimate the distance at that time to be about 300 yards below the bridge. Now you can say what you want. I am not trying to hold you or anything. I want the accurate fact.

A. Uh-huh; well, you know, it's pretty hard from up on the bridge [43] to estimate the feet, but it was around 600 feet, somewhere around there, when the bridge stuck.

Q. That's your best opinion?

A. That would be my best opinion, yes, sir.

Q. Now when that happened you were in the control at the time, weren't you? A. Yes, sir.

Q. And was Benson there with you?

A. Yes, sir.

Q. When you realized that it was stuck and the power had gone off you ran out of the control tower onto the platform, around it; is that right?

A. Yes, on the—yes, sir, on the east side.

Q. That is the up-river side?

A. Downstream, yes, and to the south the platform extends out, on the south side a few feet.

Q. You tried to, you waved your hat to the tug?

A. That's right.

Q. But there were girders and beams and so forth between you and the tug, weren't there?

A. Yes, sir.

Q. And the tug couldn't see you do that, could it?

A. Yes, he could have saw me if he had looked.

(Testimony of Oscar Herman Adams.)

Q. Well, now, I have got to refer to your written statement on that. I will ask the witness to look at this. [44]

(Respondent, Russell Towboat and Moorage Company's No. 1, statement, marked for identification.)

Q. (By Mr. Wood): Mr. Adams, will you look at the last page of those sheets and tell me if that is your signature where you signed it?

A. Yes, sir.

Q. You did sign it? A. Yes, sir.

Q. Now will you look at the—I think it's on the second page, the second page, second line from the top, I believe it is there—and I will ask you if the statement that you signed does not say this: "I immediately ran out of the control house and attempted to wave to the tug to stop and waved my hat, but because of the beams or braces of the bridge the pilot could not see me waving."

See if you don't say that there?

A. It says on the second page, you say?

Q. I think it is, yes.

The Court: Mr. Wood, will you go to the witness and point out to him?

Mr. Wood: Yes, your honor.

The Witness: I remember the very words I used, but I don't think they were put down there right. I said I doubted very much whether he saw me or not. That's the very words I used.

(Testimony of Oscar Herman Adams.)

Q. (By Mr. Wood): Have you read this, or couldn't you find it? [45] A. Yes, I read it.

Q. I will read it with you, or you can read it: "I immediately ran out of the control house and attempted to wave the tug to stop and waved my hat, but because of the beams or braces at the bridge the pilot could not see me waving." That's what it says, doesn't it?

A. Yes, and I probably overlooked it when I read it.

Q. You signed it?

A. I signed it, yes, sir. That wasn't the actual words I used.

The Court: Are you offering that, Mr. Wood?

Mr. Wood: Yes, your Honor, I am.

Q. (By Mr. Wood): Well, since your memory is so accurate, Mr. Adams, I will ask you this: How many beams and braces were there on the bridge between you where you stood on the upstream side of the bridge and the tug?

A. Well, there would be only one that would obstruct the view at all.

Q. Why do you use the words plural in your statement?

A. Well, I wouldn't know. That's all the beams there were there. That would be—just the one beam that come down from the top to obstruct my view.

Q. Now the tip of the boom had this big block on it that you have described? A. Yes, sir.

Q. That is a great, big, enormous pulley, [46] isn't it? A. Yes, it was.

(Testimony of Oscar Herman Adams.)

Q. That is what hit the bridging, didn't it?

A. No, the boom is what hit the bridge. The block, it seemed like when it hit up at the top it unhooked it.

Q. Didn't the block hit the railing of the bridge riding up?

A. When they come up the boom was high enough that this block went over the railing, but when it dropped off——

Q. That's what I say, it hit the railing, rode up over it, didn't it?

A. The boom did, yes; not the block.

Q. What kind of a day was this? What was the visibility like?

A. A clear day.

Q. A sunny day?

A. Yes, sir.

Q. Now you had no—well, you attempted to blow the whistle on the bridge, didn't you, the warning signal?

A. Yes, sir.

Q. Even though you knew it was dependent on power?

A. Well, I didn't—right at the moment I didn't know whether it was the power that was off or not. I knew that it was something that had stopped the bridge. I pressed the button to blow the whistle.

Q. And it didn't blow?

A. It didn't blow, no, sir.

Q. Was it after that then you ran out then, and tried to wave [47] your hat?

A. That's right.

Q. Did you have any other means of emergency signal there in case of power failure like this?

A. No, sir.

(Testimony of Oscar Herman Adams.)

Q. You had no horn?

A. No, nothing, only this whistle we have on the bridge.

Q. You had no red flag?

A. Red flag, no, sir.

Q. It is a fact, is it not, that after this accident the engineers have put in a regulation requiring you to have on hand some such emergency signals?

A. Since then?

Q. Yes, isn't that right?

A. Yes, I think the new regulations is now that we have to have a flag.

Q. A red flag? A. Yes, sir.

Q. In case you cannot open the draw proper?

A. That's right.

Q. In fact, its a red flag by day and a red light by night, is it, under the new regulations?

A. Well, yes.

Q. What?

A. We have red and green both there. If anything happens we [48] wave the red one, and when they are ready to proceed, why, we wave the green one.

Q. That is by day?

A. By day, and we have lanterns by night.

The Court: Is that material?

Mr. Wood: I say, those are subsequent regulations that have been put in effect since this accident.

Mr. Lister: Well, if your Honor please, I don't want to lead him in any way, but I cannot see how it has anything to do with the issues here.

(Testimony of Oscar Herman Adams.)

The Court: I think there is grave enough condition, Mr. Wood, that subsequent regulations would be sufficient to charge this man, the Bridge Company, with negligence for failure to have a lantern.

Mr. Lister: I move that all that testimony be stricken.

Mr. Wood: I have no more about that. I could refer to it in the argument.

The Court: All right.

Q. (By Mr. Wood): Were you present when this photograph was taken? A. Yes, sir.

The Court: That is Exhibit 1.

Mr. Wood: How long was that taken after the accident?

A. Just immediately, oh, in a few minutes.

Q. A few minutes? [49]

A. A few minutes. I wouldn't know just exactly, but the photographer came over from town and took the picture.

Q. Did you send for him? A. No, sir.

Q. Where did he come from, Hood River?

A. Hood River.

Q. It, apparently, was a bright, sunny day, from the looks of the picture?

A. It was a very bright day.

Q. You spoke of some lights that were on the bridge that were also dependent on the power?

A. Yes, sir.

Q. Do you keep them burning during the daytime?

A. No, only when we are raising the bridge.

(Testimony of Oscar Herman Adams.)

Q. Why do you do it then?

A. Why, we have to turn the power on at the toll house. When you turn the power on, that lights your lights underneath the bridge.

Q. Well, when you turn the power on to raise the lift the lights go on? A. That's right.

Q. Well then, when you—when the thing comes to a stop you turn the power off, don't you?

A. No, the power is still on yet.

Q. After the bridge is lifted? [50]

A. Yes, sir, without something happens like a fuse burns out like it did at this time, why then, the lights go out.

Q. I see, and what light was it then?

A. It was a light on each pier, at each end of the span down about, oh, I should judge 20 feet below the bridge, and also one in the center of the span, red lights.

Q. That was on the span itself?

A. Yes, sir.

Q. They are for use at night, aren't they?

A. Yes, we keep them on at night always.

Q. Well, isn't that their only purpose, to be used at night?

A. Well, not necessarily. I expect it is for day-time, too, in case boats go through when you turn the power on where you have to raise the bridge for the boat, why, the lights automatically come on.

Q. What are the size of these lights, Mr. Adams?

A. What size are they?

Q. Yes.

(Testimony of Oscar Herman Adams.)

A. 75 watt in the two, well, I think they are all 75, all three of them are 75.

Q. 75 watt? A. Yes, sir.

Q. In what kind of glass or bulbs?

A. Well, they are in, oh, forget now, these frosted bulbs.

Q. Ordinary bulbs? [51]

A. Well, they are supposed to be those kind that don't burn out.

Q. Frosted, did you say?

A. Yes, kind of a frosted bulb.

Q. Are they about the size of the ordinary 75-watt light you see in the house? A. Yes, sir.

Q. They are quite small, then?

A. Yes, sir.

Q. When you were hired there did you receive any instructions from the management about warning signals or anything to do in case of a power failure or any emergency? A. Yes, sir.

Q. What were they?

A. Well, give me—the instructions I had were to turn on the lights and——

Q. I am talking about in case of an emergency.

A. No, I don't think I had any instructions as to an emergency, no. Just the regular operation of the bridge.

Q. That's all.

The Court: Mr. White?

Mr. White: No questions.

The Court: Any redirect?

(Testimony of Oscar Herman Adams.)

Redirect Examination

By Mr. Lister: [52]

Q. Could you give the Court any definite information as to how vividly you could see the operator of the tug or how visible you were to him in answer to this question of whether or not——

A. Yes, I could see him when I first tried waving my hat.

Q. Well——

A. And I could even see his eyes looking up at the top of the boom. He was watching the boom all the time.

Q. You could at that time see his eyes; is that right? A. I could, yes, sir:

Q. That's all.

Q. (By Mr. Wood): Is it 600 feet away?

A. Yes, sir.

Mr. Wood: That's all.

Recross-Examination

By Mr. White:

Q. One more question. Whose eyes were you seeing on the tug?

A. The fellow that was operating the boat.

Q. Where was he standing on the boat?

A. In the top up there with the steering wheel. He was standing there.

Q. In the pilot house?

A. In the pilot house.

Q. Did you see anybody else standing near the pilot house or on the deck below?

(Testimony of Oscar Herman Adams.)

A. I think I did. I think there was a fellow standing down there. [53]

Q. He was looking up in your direction, too, was he, or did you notice?

A. No, I didn't. I was watching the man, the fellow that was controlling the boat.

Q. Where was this other man that was standing?

A. Oh, I don't recall. I know there was another man there somewhere.

Q. Was he standing on the port side or the——

A. Well, he was standing by, I should judge I could see him, I know, just glancing. I know there was another man there, but just where he was standing I couldn't——

Q. Was it on the same side, was it the side of the tug closest to the pilot house just below the pilot house?

A. He could have possibly been standing there, yes. I couldn't tell you exactly.

Q. After the collision you went out on the span, didn't you? A. Yes, sir.

Q. How long did it take you to get out there?

A. Oh, I would say a minute, minute and a half.

Q. And you left the control tower. How did you get out on the span?

A. I crawled out one of those steel girders on top there.

Q. That span where it stopped was just about in a position where you could leave the control

(Testimony of Oscar Herman Adams.)

tower and get out on the span; is that right? I mean, it stopped at about 13 and a half feet [54] high?

A. Yes, I should judge so. Well, it seemed like—I tell you, there was some braces went through there. I crawled out on one of those braces. Now just where that was on the span I couldn't tell you.

Q. But you had no difficulty getting out there?

A. I had quite a difficulty getting back. I wondered how in the world I ever made it out there, anyone as heavy as I was crawling out there on a narrow piece there about six inches wide.

Q. Did the thought ever enter your mind to go out there on the span before the collision?

A. I couldn't have gotten out there very easy before the collision, no.

Q. That's all.

Mr. Lister: That's all.

(Witness excused.)

Mr. Lister: Call Mr. Benson.

The Court: We will resume at two o'clock. We will now recess until two.

(Thereupon at 12:00 o'clock noon, the trial was recessed until 2:00 o'clock p.m., the same day.) [55]

Afternoon Session

(2:00 o'Clock P.M.—Trial Resumed)

(Argument off the record.)

The Court: You may call your next witness. I don't want any more argument at this time.

Mr. Lister: I will call Mr. Otto Hermann.

OTTO HERMANN

a witness called by the plaintiff, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lister:

Q. Will you state your name?

A. Otto Hermann.

Q. Otto Hermann? A. That's right.

Q. What is your business, Mr. Hermann?

A. Contracting.

Q. What type of contracting?

A. Oh, bridges, dams, docks and so forth, heavy construction.

Q. How long have you been in that business?

A. 27 years.

The Court: Just one second. Is there any dispute about the fact that the bridge ought to be repaired and the cost of the bridge, to repair it?

Mr. Wood: Yes, there is a dispute about the cost. We have [56] put them on their proof as to the cost.

The Court: Go ahead.

(Testimony of Otto Hermann.)

Q. (By Mr. Lister): What is your connection with the General Construction Company?

A. Vice-president.

Q. How long have you been associated with the General Construction Company?

A. Entirely 27 years.

Q. How long have you been vice-president?

A. Oh, about the last 12 years.

Q. Will you tell us generally what you have done in that capacity, Mr. Hermann, in regard to——

Mr. Wood: We will admit his qualifications.

Q. (By Mr. Lister): Did you have occasion to examine the Hood River-White Salmon Bridge on or about June 13, of last year?

A. Well, just what do you mean by that?

Q. Did you make some repairs to the Hood River-White Salmon Bridge during 1950?

A. Yes.

Q. Do you remember when you first saw the bridge in connection with the repair work?

A. I don't remember the date. I know I was up there to look it over and arrange for putting in the steel, but I don't remember the exact date.

Q. Will you tell us just generally what you saw when you arrived [57] there?

A. I saw, looked it over, and saw that the cord was bent, the lower cord, one of the posts was knocked out, and that's what we had to replace.

Q. Did you supervise, or was the work done

(Testimony of Otto Hermann.)

under your direction and supervision that was done up there?

A. It was, by our men, but under the direction of the engineering.

Mr. Lister: Mr. Wood, are you questioning the repairs that have already been done as distinguished from those that are still to be done?

Mr. Wood: No, I don't think so. I might want to have proof on it, the necessity of those that still are to be done.

Q. (By Mr. Lister): Will you tell the Court, Mr. Hermann, what you saw and what you—what was the, what were the repairs needed to be made there, and what did you do?

A. We came up—I don't recall the man's name, the engineer Mr. Chandler had hired, and we came up under his direction.

Q. Was it Mr. Dorner?

A. Mr. Dorner is right. We put in the lower cords, or strengthened it, put in a new post, and just general work to get it repaired for usage.

Q. Do you remember what your charge was for the work you did in that connection?

A. No, I do not.

Q. Were you paid for that work? [58]

A. Yes, we were.

Q. Was the charge you made a fair and reasonable charge for the work; do you know?

A. I would say it is.

Q. Was that work made necessary because of some recent damage to the bridge?

(Testimony of Otto Hermann.)

A. That is right.

Q. Now you have also, haven't you, made a bid on some work that you contemplate doing in connection with additional repairs up there?

A. That's right.

Q. Will you mark this, Mr. Clerk?

(Document, letter, marked Libelant's No. 12 for identification.)

Q. (By Mr. Lister): Will you examine that paper marked Libelant's Exhibit 12?

Mr. White: Is that the same letter you gave us in our conference, Mr. Lister?

Q. (By Mr. Lister): Is that your letter, Mr. Hermann? A. Yes, this is my letter.

Q. What does that represent?

A. It represents putting the false work under the left span.

Q. What do you mean by that? Why do you put false work under there?

A. We had a letter from Mr. Chandler requesting us to give him [59] a price on placing false work under the span in places he wishes to repair it, repair the lower cord.

Q. Would you tell us and the Court whether or not that bid for that work is a fair and reasonable charge for that service?

A. I would say it was fair at that time. I would say at this time it is not high enough.

Q. What is a fair and reasonable charge for that work?

(Testimony of Otto Hermann.)

A. Meaning right now, that labor——

Mr. Wood: Well, I object to that as immaterial, your Honor. If the bid was fair and reasonable at that time he has got to minimize his damages and go ahead and do it. He cannot wait for the outcome of this lawsuit and then take out for a possibly higher bid.

Mr. Lister: I think we will be able to show it couldn't have been done yet, if your Honor please.

The Court: The objection is overruled. I am going to let the witness testify.

The Witness: The reason I say that is the fact that labor, piling and lumber have all gone up, as you people know, since the war.

Mr. Lister: Would you gentlemen take a look at this?

Mr. White: Is this dated January 2nd, 1951?

Mr. Lister: No, this is August, 1950.

(Document, breakdown of prices, marked Libelant's 13 for identification.) [60]

Mr. Lister: If your Honor please, we offer this in evidence.

Mr. Wood: No objection.

The Court: It may be admitted.

(Letter formerly marked Libelant's No. 12 for identification received in evidence.)

Q. (By Mr. Lister): Do you have the paper, Mr. Hermann, marked Libelant's Exhibit 13?

A. Yes.

(Testimony of Otto Hermann.)

Q. What is Libelant's exhibit, what does that represent?

A. That is the breakdown of price that I gave you broken down into how many piles, cost of the piling, cost of the lumber.

Q. Did you give that breakdown at my request?

A. Yes.

Q. That adds up, does it, to the figures on Exhibit 12? A. That's right.

Q. Now are you prepared, Mr. Hermann, to say whether or not all that construction is necessary to permit that bridge to be put back in the condition it was prior to this accident?

A. Well, if you are asking my opinion on, you have to, to fix that or hold that truss, if you have to do any repairs to it, you have to have false work under it to take care of the load.

Q. Is there any other way that that could be done at a less cost, as far as you know?

A. That I have not gone into, and I couldn't say. [61]

Q. You have seen the bridge, have you not, in its present condition? A. Yes.

Q. And that is after the, what you call the temporary repairs were completed? A. Yes.

Q. What is your testimony as to the condition of the bridge in its present condition as compared to what it was before this accident?

Mr. Wood: If he saw it before. Has he seen it before? I don't think he has testified to that.

(Testimony of Otto Hermann.)

The Witness: Did I see that bridge before the accident?

Q. (By Mr. Lister): Had you seen it before that?

A. Oh, yes, we built the bridge. I have seen that.

Q. All right now, in order—what is the condition of the bridge now after those so-called temporary repairs have been completed as compared to what it was before it had this condition?

A. Well, in my personal opinion, it's just not as good.

Q. And is that based on your experience?

A. That's all it is, just to experience. I haven't gone into, done anything, anything like that.

Mr. Lister: I would like to offer that particular Exhibit 13 in evidence.

Mr. Wood: No objection.

The Court: It will be admitted. [62]

(Document, breakdown of prices, formerly marked Libelant's No. 13, was received in evidence as Libelant's Exhibit 13.)

Mr. White: Is that dated January 2nd? We want to be sure we are talking about the same thing. Yes.

Cross-Examination

By Mr. Wood:

Q. Just a question or two. The total damages claimed in this case, including the loss of use of the bridge and everything, is about \$31,000, and your item here for false work alone is \$16,400?

(Testimony of Otto Hermann.)

A. That's right.

Q. So, naturally, it leads to inquiry on our part whether such a large item as that, half of the total sum merely for false work which is going to be removed, whether that is really necessary to make these repairs?

A. Well, I don't know any other way that you—whenever you build—when the bridge was built in the first place he put false work under it. That's the way that you build a bridge. You put false work on it. Then you lay all your steel out on it, shove it up. After you have it all connected, then you swing your false work out, take it out.

Q. I don't think the Court or ourselves understand all the details. I just want your final conclusion. Is it your statement that this false work, as large an item as that, is necessary to [63] repair that bridge? A. Yes, sir.

Q. And it could not be done in some other way cheaper?

A. I have not gone into that, but right offhand I wouldn't know what way it would be.

Mr. Wood: I think that's all.

Redirect Examination

By Mr. Lister:

Q. Mr. Wood said the item was 16 thousand. As a matter of fact, it's about 19 some odd thousand, isn't it, putting it in and taking it out?

A. Well, you add your two sums.

Q. That's all.

The Court: Is there any reason why Mr. Hermann may not be excused?

Mr. Wood: No.

(Witness excused.) [64]

HAROLD BENSON

called as a witness in behalf of the plaintiff, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lister:

Q. You state your name to be Harold Benson?

A. That's right.

Q. Will you keep your voice up, Mr. Benson, so all of us can hear? Where do you live, please?

A. Hood River, Oregon.

Q. How long have you lived there?

A. I was born there, and I lived there probably 35 years, all my life.

Q. Now what is your occupation?

A. At the present time I am running a motor repair shop and doing electrical service work.

Q. What, if any, work have you done for the Oregon-Washington Bridge Company?

A. I have done their service work and stand by while they were operating the bridge.

Q. How long a period have you been doing that type of work? A. On the bridge?

Q. When did you first commence working for the Oregon-Washington Bridge Company on the bridge? A. Oh, about 1938. [65]

(Testimony of Harold Benson.)

Q. Have you worked for them off and on since that time? A. Yes, I have.

Q. Did you say 1938 or 1949?

A. I meant to say 1948.

Q. Now, will you tell us, were you present on June 13, 1950, when this accident happened?

A. I was.

Q. What was your first—what was the first thing you did? When did you get there?

A. I got there shortly after Mr. Adams called me.

Q. Did you see this equipment in the river when you—— A. Yes.

Q. Where did you come from?

A. I came from my home in Hood River.

Q. Did you drive across the bridge?

A. Yes.

Q. Did you go clear across the bridge?

A. Went across the bridge, turned around and parked on the Washington side just off the lift-span.

Q. Would you be on the right-hand side or the down-side of the bridge when you parked?

A. Right-hand side, yes.

Q. That would be the downstream side, would it?

A. Yes.

Q. When did you first see the equipment that ran into the bridge? [66]

A. As soon as I come onto the bridge, on the way over.

Q. From that time until the accident occurred

(Testimony of Harold Benson.)

were you conscious of any equipment, seeing this equipment at all times? A. I was.

Q. Where was it when you first saw it?

A. Well, I would say it was a mile or so down the river.

Q. From that time on did you notice any change in its forward progress? A. No, I did not.

Q. Now what did you do, if anything, toward lifting the liftspan of this bridge?

A. I shook one rope loose that holds the flexible cables feeding the bridge on the road level, and two up above just alongside of the control tower.

Q. As I understand it, at the time of the accident there were two structures on the bridge, one what they call the toll house and the other one is the control tower; am I correct in that?

A. That's right.

Q. The toll house was in the middle of the liftspan; is that right? A. Yes.

Q. And where was the control house?

A. The control tower was on the Washington end or north end just off the liftspan, located about 20, 25 feet above the road level.

Q. In going up and down that tower, how did you—was there a [67] ladder or steps or what?

A. A stairway.

Q. Did you go up there when Mr. Adams went up there, or when did you go up there?

A. I went up there just a little bit ahead of Mr. Adams.

(Testimony of Harold Benson.)

Q. Now as this bridge was being lifted did you watch the instruments there and see what he did and how he did it?

Mr. White: I can't help but feel, your Honor, that Mr. Lister is leading this witness.

The Court: I don't care if he is leading him. I am just wondering what is the use of all this testimony. There is no dispute about it, Mr. Lister. We have gone over that once. Let's get down and find out how the accident happened, where the boat was when he first saw it. That is the important thing and why we are here.

Q. (By Mr. Lister): Let me ask you this general question: Was there anything on any of the equipment there on the bridge that failed to function during the time this liftspan was being raised or prior to this accident?

A. No, there was nothing unusual about the operation of the bridge. Everything was operating normal.

Q. Didn't you tell me that there was something, if any, gauge or indicator was there there to show whether or not an overloading had been put on the electrical equipment?

A. Well, there is a motor there that shows the amount of current [68] the bridge is drawing under the lifting operation, and that was normal.

Q. What is the significance of that?

A. It shows what your load is at all times.

Q. Well, from your experience, from your ob-

(Testimony of Harold Benson.)

servation, was there any unusual load on this bridge at the time? A. No, there wasn't.

Q. Now what happened to the liftspan?

A. Well, nothing happened to the liftspan except power failure. It stopped, which it is supposed to do.

Q. Do you know what caused the power failure? Do you know where the power failure was?

A. According to the telephone conversation the PUD man said a fuse had blown over there in the substation.

Q. Well, are you in a position to say whether or not there was any failure of anything on the bridge itself? A. Yes, I believe I am.

Q. Well, was there? A. No.

Q. Now, as I understand it, the bridge, the liftspan was raised to a certain height and stopped. Can you tell us about how high it was?

A. Thirteen and a half feet, according to the indicator.

Q. Where is your indicator?

A. On the control panel in front of the [69] operator.

Q. Is that where you could see it?

A. I could see it from where I was.

Q. When the span stopped in that position where was this tug and its tow?

A. Oh, two or three hundred yards below the bridge.

Q. What is that, please?

(Testimony of Harold Benson.)

A. I would say two or three hundred yards below the bridge.

Q. Had it altered its course in any way as it came up toward the bridge?

A. Not that I could notice.

Q. Had it altered its speed in any way?

A. Not that I could notice.

Q. Well then, what happened from that point on? Just tell us what happened, Mr. Benson.

A. Well, as soon as the bridge stopped I immediately tried to determine why it stopped, so I checked the voltmeter there that shows the load of voltage, and it showed no voltage. It was during that time Mr. Adams went out trying to give some sort of a signal to the boat.

Q. Well, could you tell, were you in a position where you could see the boat and Mr. Adams both?

A. Yes.

Q. Did the boat slow its speed in any way before it hit the bridge?

A. I couldn't notice it. [70]

Q. Well, what part of the tow came into contact with the bridge?

A. The boom hit the bridge.

Q. Well, tell us what it looked like and how it contacted the bridge?

A. Well, I would say a few feet down from the end of the boom it struck the railing on the bridge, crashed the railing, and then crashed this steel member, what I would say would be the main stringer on the bridge steel. The beam went on through until it stuck out on the other side of the

(Testimony of Harold Benson.)

bridge and knocked at least one member loose on the other side.

Q. With regard to the toll house, where did the boom come into the bridge?

A. It just barely missed the toll house. In fact, it bruised the toll house a little bit.

Q. On which side of the toll house, the Washington side or the Oregon side?

A. The Washington side or north side.

Q. What is the condition of the bridge there as to having lights on it or otherwise?

A. Well, they have—you mean what condition the lights are?

Q. Well, tell us where the lights are, what kind they are, and whether or not they were lighted at the time this impact occurred?

A. Well, there is four navigation lights down on the piers which are more or less just marking the piers between the liftspan. Then there is one on the upstream, and one on the downstream [71] side on the liftspan.

Q. What do those lights look like? Tell us something about their dimension or something like that.

A. Well, they are red lights. That is, they are an enclosed light with red covering around them so they show red.

Q. Well, are they circular?

A. No, they are half-round.

Q. What would be the diameter of them?

A. Ten inches.

Q. When you say they are half-round, how is

(Testimony of Harold Benson.)

the light fixed into the bridge? Does the arc go up over the cord, or how is it? What does it look like?

A. Well, a little, well, there is a piece of pipe extends out of the concrete. This light is mounted on that, and it is glass all the way around the face. In the back side is an opening to get at the light to relamp it.

Q. I get the impression from what you said a while ago that one coming from downstream looking towards this bridge would see what seemed to be a half circle, a red light through half a circle; am I correct in that? A. Yes.

Q. Did you say that the diameter would be about how much, please?

A. About eight or ten inches.

Q. Now do you know whether that light was shining the day of this collision? [72]

A. No, I don't know whether it was or not.

Q. What caused that to light up; do you know that?

The Court: I don't know what the purpose of this is, this interrogation. What do you intend to prove about the light?

Mr. Lister: Well, it is our understanding, if your Honor please, that until this power went off there were red lights there, and this craft was coming in up against red lights up until the power went off. That's the way I understood from his testimony. That's why I was asking this gentleman.

The Court: Do you think that on a bright, sunny

(Testimony of Harold Benson.)

day that a ship could see a red light, 75-watt lamp, 600 feet or 1,000 feet away?

Mr. Lister: I don't know, but surely it would see it someplace. That was my understanding of the situation.

The Court: What other kind of lights did it have, green lights on the piers?

The Witness: No, red lights.

Mr. Lister: Then do you know, Mr. Benson, you say you don't know whether this light was burning. Do you know what, if any—where was the source of power of those lights? Where did they get their electric power?

A. Well, the power all comes on the same line.

Q. Do you know whether those lights can be turned on and off independently of the other equipment on the bridge?

A. The lights are controlled by a switch in the control house, [73] navigation lights as they are called.

Q. What is that, please?

A. They are called navigation lights.

Q. They have a separate switch in the—where, please?

A. In the control—or in the toll house.

Q. Now what about the whistle? There is a whistle on the bridge, isn't there? A. Yes.

Q. How does it operate?

A. From the same source of power.

Q. Do you know whether the whistle, anyone tried to blow the whistle?

(Testimony of Harold Benson.)

A. Well, I couldn't say for sure about that. I don't know.

Q. What is the fact as to whether or not the whistle could be blown under the conditions you found there when the span, the liftspan stopped?

A. I didn't understand the question.

Q. Could you have blown that whistle after the span had stopped moving upward on the day of this accident?

A. No.

Q. Why not?

A. The power was off.

Q. Now, I understand that there is some electrical equipment there that was damaged in this accident. Do you know anything about that, Mr. Benson? [74]

A. Well, as far as I know, what was damaged was some conduit going alongside of the bridge into the control—or into the toll house. Some conduit there was pretty badly damaged.

Q. Was that at the point of impact?

A. Yes.

Q. When were you on the bridge last prior to this accident happening on June 13th?

A. We made a test lift the Sunday before the accident happened.

Q. Was everything in operating order at that time?

A. Everything worked okeh.

Q. Were you there when the equipment was pulled loose from the bridge after the accident?

A. Yes.

Q. What was the condition of the bridge then? Did you have any trouble lowering it down?

(Testimony of Harold Benson.)

A. No.

Q. Well, could you do it immediately?

A. We couldn't do anything until power was restored, which was about an hour and a half later. They called from PUD and asked if we had power, and I said, "Wait a minute, we will check." So I went over to the voltage meter, and it showed voltage on all three phases, so I said, "It's okeh. We have power now," and then we could lower the bridge.

Q. Where, at that time, was this equipment that had run into the bridge? [75]

A. Well, it had gotten clear of the bridge and pulled over to the shore there and tied up.

Q. Were you there when this equipment finally went through the bridge?

A. Yes, I went home. After we had lowered the bridge to let traffic through I went on home, and 15 or 20 minutes later Mr. Adams called again and said that they were ready to come through and wanted me to come back over again.

Q. Did you go back?

A. I went back, and we raised the bridge at that time to 30 feet and let him through.

Q. Did you have any trouble raising the bridge then? A. No.

Q. Mr. Benson, I am not sure I understood fully the relationship between these so-called navigation lights and the other electrical equipment on there. Are they separate and distinct so that they have to be a separate operation to turn those lights

(Testimony of Harold Benson.)

on, or will they automatically come on when you start to lift the bridge?

A. You are speaking of the navigation lights?

Q. Yes, sir.

A. Well, the navigation lights are controlled from a switch in the toll house, and as far as I know there is no connection between that operation and lifting the span.

Q. Now you have said, distinguished between navigation lights. [76] Maybe we are not speaking about the same thing. What do you mean by navigation lights?

A. Well, I mean the four lights, one on the up and downstream side of the pier, on both sides of the lift span.

Q. I thought you said there was one light in the middle?

A. There is two lights in the middle, one upstream and one downstream.

Q. What was the condition of those two lights?

A. They worked okeh, if that's what you mean.

Q. But how do they operate? Do they operate from a separate switch, or how?

A. They operate from a switch in the toll house, not from the control tower.

Q. Mr. Benson, you didn't know whether or not that particular bridge motor turned on before you could start to lift the lift span?

A. As far as I know, it has no connection between the operation of the navigation lights and lifting the span.

(Testimony of Harold Benson.)

Q. It would be your understanding that if the operator saw fit to do so, he could lift the span and not turn on those so-called navigation lights at all?

A. It would be possible, yes.

Q. You don't remember whether they were turned on this day or not?

A. No. [77]

Mr. Wood: What was that last question?

Mr. Lister: I understood him to say on this day of the accident he didn't know whether that was turned on or not; is that correct?

A. Well, I don't know whether they were on or not, I didn't notice. Of course, in the daytime it wouldn't be noticeable unless you took particular pains to see whether they were on or not, and I didn't do that.

Mr. Lister: I think that's all.

Cross-Examination

By Mr. Wood:

Q. Just a moment, we want to ask a question or two.

You said several times that you didn't notice the oncoming tug until it stopped its forward progress. Do you remember saying that?

A. Yes.

Q. But you had no particular reason for noticing that particularly, did you?

A. Well, yes, I did. I was interested in getting that bridge up before he got through there.

Q. I know, but now the first time I think you were asked that question was when you were driv-

(Testimony of Harold Benson.)

ing across the bridge with your car. You were asked whether you noticed the tug until it slowed or stopped its progress. You said you didn't notice it. You had no reason for looking at it with that purpose in mind then, [78] did you?

A. Well, he was quite a ways away then, and I was driving a car across the bridge.

Q. Well, what reason had you for paying any particular attention as to the progress of the tug and whether it stopped or not?

A. Well, no particular reason, only that I was, I was interested to be sure that we got the bridge up or tried to before he got there.

Q. Yes, well, you had plenty of time to do that, didn't you? A. Yes.

Q. In fact, when you had the bridge up the tug and tow were about a quarter of a mile downstream from you, weren't they? After you had the bridge up? A. No, he wasn't that far down.

Q. Well, I have a statement of yours here which I will be glad to show you in which you say: "When it,——" that means the tug—"was approximately one-quarter"—

The Court: Mr. Wood, I think if you are going to impeach him he ought to see the statement.

Mr. Wood: Yes, your Honor, may I approach him?

The Court: Oh, yes.

Q. (By Mr. Wood): A man named Duncan came up and interviewed you, didn't he, and took your statement? His name was Duncan?

(Testimony of Harold Benson.)

A. I don't know his name.

Q. Anyway, a man came up and wrote this statement out as you [79] gave it to him, didn't he?

A. I remember somebody coming here, and he was writing all the time.

Q. Did he write it in your presence?

A. I was there, yes, sir.

Q. Did you read it over?

A. Yes, I think so.

Q. Well, was it correct?

A. It was fairly correct.

Mr. Lister: I can hardly hear either Mr. Wood or the witness, if your Honor please.

Mr. Wood: Well, he said he read it over and it was fairly correct.

The Witness: There could easily be differences there of a few yards or like that.

Q. Yes, I think so, yes, but I called your attention to this part of your statement: "When it was approximately one-quarter of a mile from the bridge, the bridge was put up." A. Uh-huh.

Q. Now, is that right or not? I don't care what you say. I just want to get the truth.

A. Yes, well, I would say that's approximately when we started the operation, all of the preliminaries of going ahead and raising the bridge, but that don't mean that it was a quarter of a mile down when the bridge got up and stopped. [80]

Q. How far down was it when the bridge got up and stopped, in your opinion?

(Testimony of Harold Benson.)

A. I would say two or three hundred yards, but time elapsed between the time we started the lift operation, including the preliminaries.

Q. Well then, it is true that two or three hundred yards would be six to nine hundred feet, wouldn't it? A. Approximately.

Q. Now, Mr. Benson, you do not work for the bridge regularly, do you, but, as I understand it, you are called out there when they expect to lift this span? A. That's right.

Q. You are called out there so that you will be on hand in cases of any electrical difficulty; isn't that right? A. Yes.

Q. Do they always call you out when they get notice they are going to lift this span?

A. Yes, I couldn't say that they always have, but in the last year I would say that they have called me just about every time. There was a time or two that I was not available—that I wasn't there.

Q. Well, do you know whether they had experienced any power failures before this?

A. Not during lift operation. There have been other power failures. [81]

Q. That affected the bridge?

A. Not during the operation of the bridge.

Q. Well, what were those other power failures? What did they affect, the lights, or what?

A. Power and lights both.

Q. Well, they have had other instances than when the bridge was without any power; is that correct? A. That's right.

(Testimony of Harold Benson.)

Q. How many of those do you know of?

A. Two times that I can remember.

Q. How many?

A. Two times that I can remember.

Q. Over what period of time?

A. Well, as soon as it was noticed by the bridge tender, he called me, and I went up.

Q. Excuse me, I didn't mean that. I meant was it over a period of six months or a year or what?

A. Oh, a year, I would say a year and a half.

Q. Now, I would like to get a little clearer the picture in my mind about Mr. Adams waving his hat to the tug. You were both in the control tower when the bridge stuck; weren't you?

A. When the bridge stopped, yes.

Q. And the control tower is on the, it's not on the lift span, but it's on the tower right beside it, isn't it?

A. Yes. [82]

Q. So as the bridge lifted up the span lifted up?

A. Uh-huh.

Q. I suppose the level, the deck of the span came up abreast with the control tower, did it, or did it go above it?

A. Well, it must have been below it.

Q. Below it? A. Yes.

Q. How far below—there is a platform around the control tower out onto which Mr. Adams stepped, isn't there? A. Yes.

Q. Well, how far was the deck of the span below that when it came to a stop?

A. Well, maybe eight or ten feet.

(Testimony of Harold Benson.)

Q. Were there steps leading down so that Mr. Adams might have walked down onto the span?

A. No, there were no provisions made for walking from there to the lift span.

Q. Was there any way that he could even get from the platform to the lift span?

A. Not without walking on steel beams and taking his own chances. There isn't a stairway, runway of any sort.

Q. Does the platform around the control tower extend downstream from it as well as upstream?

A. It extends along the east side out past the control tower three or four feet, clear around the control tower, and on the [83] west side about the same——

Q. Well then, Mr. Adams apparently could have walked on the downstream side and waved to the tug, could he not?

A. No, he could not because on the west side or downstream side there is transformers supplying the juice to the bridge, and there is a sign there says, "Danger, keep away." That is all high voltage.

Q. How big is that transformer?

A. There is three or four transformers out there.

Q. How big are they?

A. Well, they are about so high (indicating), so wide. (Indicating.)

Q. They also then would tend to obstruct the

(Testimony of Harold Benson.)

view from the men on the tug to Adams; would they not?

A. No, because they were below the windows.

Q. Below the windows? A. Yes.

Q. I know, but Adams was not in the windows; he was outside, wasn't he?

A. Yes, but the transformers are on the west side of the building.

Q. Oh, I see. Well then, if they are on the west side of the building and not to the south of the building at all, Adams, it seems to me, could have gone on the downstream side of the bridge. I don't understand that. [84]

A. No, he couldn't get there without getting into this high voltage.

Q. Well, all right.

A. Because the platform—there is no platform on the north side of the control tower.

Q. No?

A. It's just on the east side and the north side and west side.

Q. Isn't it on the south side? A. No.

Q. How long a time did you say it was elapsed between the time the bridge came to a stop and the collision happened?

A. Oh, anywhere from two to five minutes.

Q. What?

A. About three to five minutes, approximately.

Q. I have to show you your statement again, unless you want to take my word for it. Didn't you

(Testimony of Harold Benson.)

say in your statement five to ten minutes after the bridge was raised?

A. Maybe I did. Yes, I remember at the time when he wrote it down I corrected him on that. I says, "I don't believe, come to think about it, it was that long because we didn't have that much time."

Mr. Wood: I am going to offer that statement in evidence.

The Court: Well, the witness admits that he made the statement, made the remarks that was included in the statement.

Mr. Wood: Very well. I guess there is no use offering it. [85] I agree with your Honor.

Q. (By Mr. White): Do you deny that you made that statement?

A. No, I didn't deny it. I merely stated that at the time he wrote it down I corrected him on it and said that, on second thought, I didn't believe it that long, but he left it go that way. However, I didn't sign the statement.

Q. (By Mr. Wood): Now, Mr. Benson, you don't know whether the whistle was affected by the power failure or not, do you? A. Yes, it was.

Q. Was there any other emergency signal on the bridge like a horn or a flag or a battery operated, noise-sounding device or anything that would be an alternate signal if the power failed?

A. No, not that I know of.

Q. Is there any log kept about the operation of that bridge? A. I wouldn't know.

(Testimony of Harold Benson.)

Q. Do you know whether these previous power failures were entered into any record?

A. Not that I know of.

Q. Did you ever receive any instructions from the bridge owners about what to do in the event of power failure?

A. No.

Q. But they called you out there almost every time in case there should be some electrical difficulty, you said?

A. Yes.

Q. Well, besides these power failures were there other electrical [86] difficulties that you know of that happened before this?

A. Well, there has been things to repair on the bridge.

Q. That isn't what I meant. I mean, regardless of power failure, have there ever been times when they would try to open the draw that they had any difficulty due to electrical failures?

A. No.

Q. Not that you know of. All right, that's all, thank you.

Cross-Examination

By Mr. White:

Q. The bridge knew of these several previous power failures of which you spoke; the bridge knew about their existence, didn't they, the bridge tender; isn't that right?

A. I imagine they did.

Q. Were there any—there were no rules and regulations or any statements to you by any official of the bridge company as to what to do in the event of a power failure? Was there?

A. No.

(Testimony of Harold Benson.)

Q. You spoke of this catwalk around the three sides of the control tower mentioning the east side. There was a catwalk on the north side and the west or the downriver side; is that right? A. Yes.

Q. How wide were these catwalks?

A. About two feet wide.

Q. How much?

A. About two feet wide. [87]

Q. How wide were these transformers? Did they occupy the whole catwalk on the down-river side?

A. No, there would be room to squeeze through there, but there is a sign up there, "Keep out, high voltage." A person really would not have any business in there.

Q. Was that sign strung on a little chain, or was that just a sign near there?

The Court: Well, you wouldn't want a man to go past and by a high voltage transformer where he had to squeeze through, Mr. White.

Mr. White: Pardon me, your Honor.

Q. (By Mr. White): Would a man have to squeeze through there to get out there on the east end there on the catwalk?

A. Yes. He would be taking his life in his hands when he went out there, too. If he waved a flag it's liable to get tangled up with high voltage.

Q. On the east side of this control tower there were a lot of cables; were there not? That's the down-river side. A. Yes.

Q. And members of the bridge tower going past the control tower?

(Testimony of Harold Benson.)

Mr. Wood: Just for the sake of the record, I believe there is confusion there. Do you mean to say east side?

Mr. White: No, down-river side, the west side.

The Witness: The cables are farther south than that, I believe. [88]

Q. (By Mr. White): Do the cables extend just south of the control tower?

A. The main junction box there is below the floor level of the control tower.

Q. The cables hang down and come up?

A. The cables droop up.

Q. So the cables that droop like that went up to the part of the span that lifted, would be on the south edge of the control tower; isn't that about right?

A. Well, I don't know, that is hard to say, whether they were on the south edge, but they were south of the control tower.

Q. Did they obstruct your view? Did you look out of the control tower at all? A. Yes.

Q. Was there anything obstructing your view?

A. Well, the steel work is always there.

Mr. White: That's all.

Redirect Examination

By Mr. Lister:

Q. I wonder if we ought to get this picture straight now. As I understand it, you said this catwalk or runway went around the building except for the southerly side of the control tower?

(Testimony of Harold Benson.)

A. That's right.

Q. Then did I understand you to say that on the upstream side or the east side that it extended out southerly from the edge of the [89] control tower?

A. Yes.

Q. How far would you say that went out there?

A. Two or three feet beyond the south side.

Q. Now keeping that—I believe you testified as to the height of the control tower above the deck of the bridge. Will you give me that again, what that was?

A. Yes, around 25 feet.

Q. Now that 25 feet, where does that represent, about where this catwalk or——?

A. That's the level of the catwalk and also the floor level of the control tower.

Q. Then if that estimate is correct, then you said that the indicator showed that the liftspan had gone up 13 and a half feet, didn't you?

A. Yes.

Q. Well, wouldn't the difference between 25 and 13 and a half, wouldn't that represent the difference between the liftspan as it came to rest and the floor of the control tower or this platform?

A. Yes, it is only that the height of the liftspan was accurate and the height of the control tower, we were merely guessing that, but that's approximate.

Q. Well, keeping those figures in mind, can you tell us about what the distance was between the platform or the floor of the [90] control tower and the liftspan when it came to rest?

(Testimony of Harold Benson.)

A. Somewheres between five and ten feet, I would say.

Q. Did you say what, if any, obstacles there were between the place where Mr. Adams stood and gave the signal and the oncoming tug and tow?

A. What was the question?

Q. What, if any, obstacles were there between the point where Mr. Adams stood signaling and the oncoming tug and tow?

A. There were steel members on the bridge.

Q. Could you take the picture and show us which one, what members there were there that would be involved?

A. Well, I don't know.

The Court: Hand him the pictures.

The Witness: I am not much on pictures.

Mr. White: I couldn't find a picture of the control tower there.

The Witness: Well, that picture there would give you a pretty clear idea of what you would be looking through if you looks towards the river.

Q. (By Mr. Lister): You are referring to Libelant's Exhibit No. 8, aren't you?

A. That's the sort of construction you would be looking through. It wouldn't be that same angle.

Q. In other words, this picture does show the toll house itself, doesn't it? [91]

A. Yes.

Q. And the toll house, you said, was about in the middle of the liftspan, didn't you?

A. Yes.

Q. And as I see this picture, you are looking toward the Oregon shore, aren't you? I notice it says, "Entering Oregon." Does that help to

(Testimony of Harold Benson.)

straighten you out on it on that sign? As you look into the picture that sign says, "Entering Oregon." Does that have any significance?

A. Well, isn't the toll house on your left there?

Q. I don't see it here at all.

A. See (indicating).

Q. Oh, the toll house, you mean? A. Yes.

Q. The toll house as you look into the picture is on the right?

A. Yes, well, that would be looking towards the Oregon side.

Q. Then the control house wouldn't actually be in this picture at all, would it? It isn't in this picture at all, is it? But you are saying that's a similar structure? A. A similar structure, yes.

Q. Went across the full liftspan of the bridge, that's what I see.

A. That's what I was trying to get over.

Q. Could you tell us with regard to the center of the liftspan—you have already said that that impact was immediately north on [92] the Washington side, didn't you, of the toll house?

A. Yes.

Q. As this equipment approached the bridge did it change its course from right to left or otherwise?

A. Well, I don't, not that I noticed.

Q. So far as you could see, it came, he was trying to go through the center?

A. As near as I could tell.

Q. Were you in a position to see the man who was operating the equipment, the tug?

(Testimony of Harold Benson.)

A. Well, I noticed there was a fellow or two on the tug, but where they was standing, I wouldn't, I don't know.

Mr. Lister: I have no other questions.

Recross-Examination

By Mr. White:

Q. I have one more. Mr. Benson, were you there right after the collision when Mr. Adams scrambled out on the span? A. Yes.

Q. He got out there pretty quick, didn't he?

A. Well, it wasn't too long.

Q. How did he get out there?

A. Crawled on some steel members there on his hands and knees and went on down, and I didn't, I wasn't taking particular notice, but I know that he was climbing around to get down there.

Mr. White: I believe that's all. [93]

Mr. Lister: That's all.

The Court: That's all, Mr. Benson. Call your next witness.

Mr. Lister: Call Mr. Dorner. [94]

W. J. DORNER

called as a witness in behalf of the plaintiff, and having been first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Lister:

Q. You stated your name to be W. J. Dorner, did you not? A. Yes, sir.

Q. What is your business, Mr. Dorner?

A. Consulting engineer.

Q. What study and schooling have you had to fit yourself for that calling?

A. A degree in civil engineering.

Q. Where, please?

A. Oregon State College.

Q. When did you get that degree?

A. 1936.

Q. What other schooling, if any, had you had? Have you had any schooling since then?

A. No, not other than the reading of technical publications and different societies I belong to.

Q. Where have you worked? Where have you had your office?

A. I have my office in 715 Dekum Building.

Q. In Portland? A. Yes, sir. [95]

Q. Multnomah County? A. Yes.

Q. How long have you worked, how long have you been working here in Portland?

A. About three and a half years.

Q. What did you do before that?

(Testimony of W. J. Dorner.)

A. Oh, about five years in the Army and about six years with the Bridge Department of the State of Oregon, Highway Department.

Q. Does that add up to all the time since you graduated from Oregon State? A. Yes, sir.

Q. You were with the Highway Department; you were in the Army; then you came to Portland?

A. I had my office in Pasco, Washington, for about a year and a half.

Q. Where? A. Pasco, Washington.

Q. I see. What type of work had you done, what did you do when you were working for the Highway Department?

A. Bridge construction supervision and also design.

Mr. White: Also what?

The Court: Design.

The Witness: Bridge construction and bridge design.

Q. (By Mr. Lister): What did you do when you were in the Army?

Mr. Wood: We admit his qualifications. [96]

Q. (By Mr. Lister): Have you had any, have you done anything with this particular bridge prior to June 13, 1950?

A. Yes, sir, Mr. Chandler asked me to perform an investigation in 1948.

Q. What did you do then?

A. We were investigating the movement of one of the approach spans, and I made a report on the

(Testimony of W. J. Dorner.)

condition that I had found the approach spans and adjacent spans to that at that time.

Q. Can you tell us just generally what kind of a bridge is this Hood River-White Salmon Bridge?

A. Originally it was a simple, a group of simple spans from pier to pier, and at some time later the U. S. Engineers put in a liftspan in the center of the channel, in other words, made one of the stationary spans into a liftspan.

Q. Do you know how long the liftspan is?

A. 206 and one-half feet, I believe.

Q. Is there any other distinguishing feature about the bridge? You say it's a highway bridge, isn't it?

A. Yes, sir.

Q. Built for vehicular traffic?

A. Yes, sir.

Q. Is it so designed and constructed that it will withstand any reasonable—what load limit will it stand?

A. At the time the bridge was designed in 1922, it was designed on one of the older theories of design. I can't quite place [97] what the nomenclature on that theory is, but heavy loading for county bridges, I believe.

Q. What is that?

A. Heavy loading for county bridges. It is not up to the standard at the present time, but they, of course, have a load limit that restricts.

Q. When you investigated the bridge in 1948, what was the condition?

A. Structurally it was in good shape except the fact that its original design was—of course, at that

(Testimony of W. J. Dorner.)

time was very good, but, of course, loads have increased since then, and the bridge is a little bit frail under present loadings, and of course, it was vibrating, primarily due to the timber deck.

Q. What is that, please?

A. It was vibrating due to impulses from impact through a timber deck on to a structural steel truss. Now these, of course—I am talking about the bridge spans.

Q. Now when did you first see the bridge after June 13, 1950?

A. I received a call about six-thirty Wednesday morning, indirectly, from Mr. Chandler and arrived in Hood River, I believe, around ten o'clock on the 14th.

Q. Of June? A. Yes, sir.

Q. 1950? A. Yes. [98]

Q. What did you find, and what did you see?

A. Well, I met Mr. Chandler and noted the damage that had been done, and he asked me to prepare a report on my findings of the damage to the bridge.

Q. Did you do that? A. Yes, sir.

Q. Just tell us what you found and what was the condition. Do you have notes on that that you need to refer to?

A. I would rather refer to my notes I took at the time.

Q. Do you have them?

A. I believe you have them.

Q. Did you give them to me?

The Court: Mr. Wood, have you any objection

(Testimony of W. J. Dorner.)

if he refers to his notes to refresh his recollection?

Mr. Wood: No.

The Court: Go ahead, Mr. Wood has no objection.

Q. (By Mr. Lister): Now will you refresh your memory then and tell us what you found in the way of damage to the bridge?

A. Of course, damage was confined both to the downstream truss and the upstream truss. We had better take them separately so that we don't become confused between the two trusses.

Mr. Wood: If your Honor please, I don't care about any testimony about whether this truss was damaged or that truss. I think what we want to know is what it would cost to make these [99] repairs.

The Court: That is all I am interested in.

Q. (By Mr. Lister): All right. Mr. Dorner, did you supervise the temporary repairs that were made to that bridge? A. Yes, sir.

Q. We have alleged that—do you know what the cost of those repairs were? We have alleged——

Mr. Wood: Never mind what you allege.

Mr. Lister: Well, are you denying that, Mr. Wood?

Mr. Wood: Yes, I am putting you on that proof on these damages, but I don't care about a lot of details.

Q. (By Mr. Lister): Do you have a record there of the repairs that have been made, Mr. Dorner, in your notes?

(Testimony of W. J. Dorner.)

A. Yes, sir, that is in here. I believe you have a copy of my drawing which I show all the repairs that were completed.

Q. Would you help me find that.

(Colloquy off the record.)

Q. (By Mr. Lister): Now, will you tell us what was done, Mr. Dorner.

Mr. Wood: If your Honor please, I am going to try to shorten this for your Honor and counsel if you want me to.

The Court: Yes.

Mr. Wood: All I want this man to testify to is that he saw the damage to the bridge; it cost so much to make those repairs; and no repairs were included therein which were not attributable to the damage. [100]

The Court: Yes, I know that, but Mr. Lister has his own theory about how he is going to prove it.

Mr. Dorner, did you see the repairs that were performed to the bridge?

The Witness: Pardon, sir?

The Court: Did you see the repairs that were put into the bridge?

The Witness: Yes, sir, I was there during the repair period.

The Court: Did you see the bill that the General Construction Company submitted?

The Witness: I have the time sheets that I took while I was there of all the men that were on the job.

(Testimony of W. J. Dorner.)

The Court: Do you know what bill they submitted?

The Witness: Yes, sir, I know the amount of it.

The Court: What is the amount?

The Witness: There is one around. May I refer to my notes?

The Court: Yes.

The Witness: Let's see, they are not included in these here.

The Court: Do you know the amount of the bill, Mr. Lister?

Mr. Lister: General Construction Company, \$1,641.07. That's General Construction Company's bill. It has been paid.

Mr. Wood: One thousand six hundred what?

Mr. Lister: \$1,641.07. Was that a fair and reasonable charge for that work?

The Witness: Yes, sir. [101]

Q. (By Mr. Lister): Was that work necessary because of the damage done to this bridge?

A. Yes, sir.

Q. Were you familiar with the work done with the riprap, temporary use, wire rope, expense of \$71.03; is that a fair and reasonable charge?

A. Yes, sir.

Q. Was it necessary because of damage done to this bridge? A. Yes, sir.

Q. Benson Motors Service, electrician, time put in, three hours, \$7.50. Is that a fair charge?

A. I would say very reasonable.

Q. Do you have a bill, W. J. Dorner, time and

(Testimony of W. J. Dorner.)

expense in June, structural engineering and repairs, \$268.70? A. Right.

Mr. Wood: A little more clear on your figures, please.

Mr. Lister: \$268.70. Does that represent time and work that you put in in connection to the repairs to this particular bridge?

A. That was the preliminary work, yes, sir.

Q. Is that a fair charge for your services?

A. Yes, sir.

Q. Were your services necessary in connection with the repair of this bridge?

A. Yes, sir. [102]

Q. Are you familiar with the bill of Pool, McGonigle & Dick, furnishing fabricated steel parts in the amount of \$710? A. Yes.

Q. Was that work done because of the damage sustained by this bridge in this collision?

A. Yes, sir, they were members that they had to replace or re-fabricated.

Q. Is that a fair charge for that?

A. Yes, sir.

Q. Joseph Holt & Company straightening by heat control two members, \$601.25. Were you familiar with that work done by that company?

A. Yes, sir, I was there when it was done.

Q. Was that necessary because of the damage done to this bridge in this collision?

A. Yes, sir.

Q. And is the figure charged a fair and reasonable charge for that service?

(Testimony of W. J. Dorner.)

A. Yes, sir, it was.

Q. Now where we have your bill for time and expense in July, \$493.30. A. Yes.

Q. Did you perform services for this, in connection with this repair in July?

A. That was my time on the job when the different contractors [103] were performing their operations.

Q. Is that sum a fair and reasonable charge for your services?

A. Yes, sir, it also includes the reports and the final drawings.

Q. Now what have you done, if anything, in regard to these additional repairs? What do you know about that, Mr. Dorner?

A. I don't understand what you mean by additional repairs.

Q. Isn't it contemplated there will be some additional repairs to this bridge? A. Yes, sir.

Q. What do you know about them?

A. Very little, other than the fact that they will be required to bring the span back into its condition equally to what it was before the collision.

Q. In what way is it not now in the condition it was before the accident?

A. We performed a splice in the lower cord on the downstream draws which is more or less of an expedient which allows us to use the bridge to its fullest capacity, but at the same time it is not, it destroyed the continuity of the lower cord and

(Testimony of W. J. Dorner.)

should be replaced in order to—I don't think it is necessary to be replaced—let me state that over. To bring the camber of the trusses back to something that would be more or less the original condition we should replace this splice of the lower cord and restore the camber to its original position.

Q. What do you mean "camber," Mr. Dorner?

A. Camber is the amount of crown in a truss that is put in at the time of its construction to—in other words, a positive camber is put in, every center of your bridge is always higher than the ends. In other words, the positive camber is put in there for the purpose of not letting a sag develop in the lower cord.

Q. Do I understand correctly if the bridge does not have a certain amount of camber, as you call it, it will soon sag and be unfit for use; is that correct?

A. Well, the camber, if it becomes negative, helps to hasten the deterioration or the failure of the bridge due to the impact stresses that may, that are developed in the structure.

Q. What, if any, study have you made to determine the nature and extent of the loss of camber in this bridge?

A. I ran a line of levels over both trusses, the upstream truss and the downstream truss, to determine how much camber remained in both trusses. and one of them was, the upstream truss, two and a quarter inch camber, and the downstream truss, two and a quarter, but the downstream truss didn't

(Testimony of W. J. Dorner.)

come in a true arc. It had a sag at the point of the splice.

Q. What is the significance of that, Mr. Dorner?

A. Well, we have probably—it's hard to say other than we assume and think that our stress distribution through the truss has been affected to a certain extent which is not—there is [105] no feasible way of actually determining it, but there has been a distortion from the original, from the time that the truss was sprung and its original construction that, perhaps a slight misalignment or this slight misalignment has produced stresses other than——

Mr. Wood: I can't hear you, has produced what?

A. Has produced stresses possibly greater in some members than are originally designed for.

Q. Is that because of the collision?

A. Yes, because the downstream truss definitely does have a sag at the splice point. I might mention the fact that after a truss is sprung and the falsework has been kicked out your stress in a member will vary considerably with just a very small movement of what we call the panel point.

Q. Well now, you have observed that bridge. Do you want to tell us—how much effort have you made to determine whether or not it is necessary to do anything more to make the bridge in substantially the condition it was before this accident?

A. I believe it is necessary to bring the camber back up to a point that it was before the collision at least.

(Testimony of W. J. Dorner.)

Q. How can that be done?

A. Well, we have no way of determining how much was lost due to the collision, but the only way to put camber back into a truss is to put falsework under it and support it while the truss is——

Q. Have you seen these figures given by the General Construction [106] Company regarding the procedure to be used and the cost of putting the falsework in there?

A. Yes, sir.

Q. Is there any other practicable way to do that?

A. No.

Q. Can it be done any more economically?

A. I would say not.

Q. What is the fact as to whether or not until that is done that, as you say, camber restored, will that bridge be in substantially the same condition it was before this accident?

A. Well, the question is to restore, the bridge is not or cannot be restored to its condition before the collision until the camber is replaced.

Q. Well, is there any other way to do it than suggested by Mr. Hermann?

A. I would say that there are other ways to do it, but I would say that that would be far beyond the realm——

Q. I mean, is there a more economical way of doing it?

A. No, there is none.

Q. Now when this work is done as indicated by Mr. Hermann, testified to by him, then what will you have to do in the way of putting the bridge

(Testimony of W. J. Dorner.)

back in its original condition, the condition it was before this accident?

A. Well, Mr. Hermann will perform on his estimate there for placing of the falsework under the bridge, and then after the [107] falsework is in place each panel will have to be jacked up to the height that you want it, and the splice taken out and the new member put in to the full extent on the lower cord.

Q. How long a member would that require?

A. Well, it would be made out of 40 foot sections.

Q. How many sections would you need, what would be, would you have to put in the full 260 some feet? Would you have to put a member clear along the——

A. No.

Q. How far would you have to make it?

A. Well, the new lower cord would have to be roughly around 40 feet long, a little less than 40 feet.

Q. Did I understand you to say that the member you would have to renew, to put in, would be 40 feet long?

A. Yes, sir, it is continuous from two panel points.

Q. Could you tell us, it has been estimated that in order to put this member in after, separate and apart from what Mr. Hermann plans, has testified to, over and above the work he is going to do, would cost some 37 hundred——

Mr. Wood: I think that's too leading.

(Testimony of W. J. Dorner.)

The Court: That is clearly objectionable, Mr. Lister.

Q. (By Mr. Lister): All right, can you give us an idea as to the cost of replacing this member separate and apart from the work that Mr. Hermann has testified to in regard to putting in and removing the falsework? [108]

A. Well, after this falsework is in place then some other contractor or whoever does the work would have to remove the existing member that is spliced.

Q. What would be a fair and reasonable cost for doing that type of a job?

A. Well, that would depend some on the availability of the contractor at that time, but I would say between three and four thousand dollars.

Q. Do you know of any other—was there some damage to some conduits or something there that has been reported or that should be reported, Mr. Dorner?

A. Yes, sir, I was engaged to determine the structural damage, but I did make some notes regarding the other damage that I noted.

Q. Will you tell us what it was, please?

A. There is a group of five conduits, electrical conduits, which control or house the electrical circuits that are operating in the toll house. This nest of conduits was pretty badly beaten up by the boom striking it, and they were torn out of position and bent very badly. Two panels of cord rail and hand rail on the downstream side of the truss were

(Testimony of W. J. Dorner.)

practically destroyed. There was some damage to the toll house.

Q. Would you be in a position to give us an estimate of what would be the reasonable cost of repairing that back in its original condition? [109]

A. Well, I made a note at the time I made the investigation that the toll house could, perhaps, be fixed for \$25.00. I didn't make the estimate on the electrical repair, but I would say that, possibly, \$150 or \$200 would cover that.

Mr. Lister: I think you may cross-examine.

Cross-Examination

By Mr. Wood:

Q. I only have, I think, one question to ask, and I thought you said that you didn't know how much camber there was in the member before the collision. Did you say that? A. I did, yes, sir.

Q. If you don't know how much camber there was there before the collision, how do you know what you have got to do to put the camber back in the condition it was before the collision?

A. Well, according to my camber observations, the two trusses do have different camber, and there is quite a difference in camber between the downstream truss at the point of splice than there is in the upstream truss.

Q. They should be alike, shouldn't they?

A. Normally they should be alike. We would assume that both trusses would take the same.

(Testimony of W. J. Dorner.)

Q. Do I put this accurately then, because the downstream camber, member that has been spliced has a less camber than the upstream one, you infer that the camber in the downstream one has been reduced that much; is that it? [110]

A. That's right.

Q. You want to put one in where they would both be alike; is that right?

A. We would like to restore the camber such that it would be alike all the way through, and the only way to do that is to replace this other member.

Q. And to make it like the upstream one?

A. That's right.

Q. My associate here suggests that you said that the camber in the two members, the upstream and the downstream one, were the same, two and a quarter inches I believe, except that the downstream one sagged a little where this splice was; is that right?

A. That's right, sir.

Q. That's all.

Cross-Examination

By Mr. White:

Q. Didn't you also mention that you did not know, that because that little sag existed you could not or you did not know whether there were any internal stresses or any kind of stresses that would affect the bridge; it was speculation on your part?

A. Well, that's a difficult point to prove.

Q. No, but you don't know it, do you; isn't that what you——

(Testimony of W. J. Dorner.)

A. There is no physical way of proving that.

Q. No.

A. But innumerable tests have been made on the distortion in joints [111] and their influences on stresses to members.

Q. But it is in the realm of conjecture, nevertheless; isn't that right?

A. No, it has been physically shown that a distortion in the panel point will produce stresses that were not calculated for.

Q. May produce stresses; isn't that correct? It doesn't always produce stresses?

A. Well, nothing is "always," no.

Q. So isn't it fair to say that insofar as this collision affected the bridge, it did not disturb the camber, but it did affect a segment, a little sag on that lower cord only?

A. No, I wouldn't say that because I have no way of knowing what the camber was in the bridge before the collision occurred. On the upstream truss one vertical post and one horizontal strut were completely severed from the continuity of the truss. In other words, they were broken off entirely. Now how much settlement that caused in that upstream truss I have no way of telling other than the fact that we do know that the camber is way short of what it was when it was put in.

Q. What was the camber when it was put in?

A. Three and three-quarters inches.

Q. When was it put in? Do you know when that bridge was built?

(Testimony of W. J. Dorner.)

A. Well, I think that was the time that the U. S. Engineers put in the liftspan. I think that was in—I am guessing now.

Q. The early 30's, was it? [112]

A. In the early 30's, something like that.

Q. And as a bridge is used, camber, just like a spring, tends to go out, right?

A. It does to a certain extent.

Q. This is a structure which has been getting heavy loads, as you have testified earlier, maybe heavier loads than it was designed for? Wasn't that the gist of your early testimony?

A. Well, they have a load limit on the bridge, and very few loads that are over the load limit are on it. In other words, the bridge is posted on both ends.

Q. So the camber when it was first built was three and a quarter inches, and now it is two and a quarter inches?

A. Three and three-quarters inches.

Q. Three and three-quarters inches. Now it is two and a quarter inches; is that right?

A. Well, that is correct, excepting the fact that the downstream truss, the camber has a wobble in it.

Mr. White: That's all.

Redirect Examination

By Mr. Lister:

Q. When you said it had a wobble in it, as I understand it, normally the bridge which is built

(Testimony of W. J. Dorner.)

on that sort of an arc would settle down, and the arc would still be a symmetrical design?

A. That's right.

Q. That is true of the upstream side of this bridge at the [113] present time?

A. Yes, sir.

Q. But on the downstream side instead of being symmetrical at the point where this impact occurred there is a sag in this curve, what you might call it; is that a fair way of stating it?

A. That is correct.

Q. So that there won't be any mistake now, you said you didn't know what stresses would be set up. Is there any doubt in your mind as to whether or not it is necessary to restore this so-called symmetry or this loss of camber at this particular point in order to put the bridge back in reasonably the same condition it was before this accident?

A. It would be necessary to do that work to make the truss in a condition equal to it before the accident.

Q. Is there any other material, is there anything other that we should know about that would be significant in determining whether or not they could get by as they now are, or whether there should be more work done that you haven't brought out here?

A. No, I don't believe so, other than the fact that it would take the placing of falsework underneath the span, the jacking of the span—

(Testimony of W. J. Dorner.)

Q. Would you as an engineer have any idea how long a time it would take to place this falsework, make the repairs, and remove the falsework?

A. Well, I would say that the placing of the falsework would be, [114] would take a large part of the time. Perhaps in a matter of four or five days the member could be replaced.

Q. You mean if the falsework has been put in?

A. After the falsework has been put in. The placing of the falsework, of course, would be the most difficult due to the fact that the waters—it would take false piling probably around 110 feet long.

Q. Now this member that is needed there could be fabricated and be available to be put in immediately as the falsework has been placed and the member jacked up?

A. That's right, it could be prefabricated, excepting that on one end we would have to field bore the holes in order to get the alignment perfect.

Q. Is there any damage at the ends of this liftspan resulting from this collision?

A. Yes, the guide shoes on the liftspan on the downstream side on the lower cords were bent outward considerably, due to the fact that the impact of the boom against the side of the lower cord. The pulling of these guide shoes distorted and bent the diaphragms inside the gusset plates at the L-zeros on the downstream truss.

Q. What would be the cost of repairing that particular damage?

(Testimony of W. J. Dorner.)

A. That could not be accomplished unless the center of the span were, or the span was swung on falsework because, as the truss now stands, if you were to sever the sections between the [115] lower cord and the panel on the end point, the end frame, you would lose your bridge, and that, of course, could not be done unless the center was supported.

Q. Well, suppose the same support then, that you have mentioned to support the, to renew the camber, would that be a sufficient support to do this other work? A. Yes, sir, because——

Q. Well, after you got that done, then what would it cost to make the repairs that you are now indicating at the end of the span?

A. Well, from the materials standpoint the material would be practically negligible because the diaphragms consist of very small pieces of plate and angle, but the time and expense of taking all the rivets out that hold that piece in, the diaphragm in place, and then the time to replace the rivets into the new piece, it would be entirely a labor charge. It might take a couple of days, two or three days to do the both ends.

Q. Well, can you give us—what would be a fair and reasonable charge for that type of repair?

A. Oh, I would say four or five hundred dollars, perhaps.

Q. As I understand it, that cannot be done as the bridge now sits there?

A. It cannot be done as the bridge sits there, no.

(Testimony of W. J. Dorner.)

Q. Why did you say that was necessary? What difference does that make? How does that impair the efficiency and effectiveness [116] of the bridge?

A. Well it is not impairing the efficiency of the bridge particularly. It is a matter that should be done when the lower forward splicing is removed and replaced with a new member. Admittedly, it is not as good in condition as it was before the collision, but it is one of the things that resulted from the collision and the diaphragm is there for a purpose, to keep the gusset plates from buckling, and even though they are more of a matter of, as a factor of safety, from the overall picture they should be replaced.

Q. Now does that give us a full picture now of the condition of the bridge as it now sits and in which it was prior to this accident?

A. There is one gusset plate on the upstream truss that is pretty badly damaged. The boom hit the downstream truss, apparently went across the deck, and hit in the center of one of the gusset plates on a vertical and a horizontal member on the upstream truss, and in doing so it tore out a part of one of the gusset plates at what we would call M-7, which is a main gusset plate at the center of the span midway between the upper and lower cords. That gusset plate has been temporarily spliced and repaired, but we have no way of knowing the continuity of the stresses in the members surrounding that gusset plate. That gusset plate, too, must be repaired—or replaced.

(Testimony of W. J. Dorner.)

Q. Can that be done without lifting the center of the bridge? [117]

A. No, sir, that cannot be done either because it is one of the control points in the truss. Without you were to loosen all the members in that span, why, your bridge would probably fall.

Q. Now is there anything else?

A. I don't believe so.

Mr. Lister: You may inquire.

Recross-Examination

By Mr. Wood:

Q. If there had been no collision, this bridge had a certain life span ahead of it, didn't it, a life expectancy? A. That's right.

Q. How long would that have been?

A. Well, that depends entirely on——

Q. Oh, just now give me your best estimate, not a long speech about it.

A. I wouldn't want to answer that because it depends on a lot of factors.

Q. You cannot make——

A. You see, the Highway Department figures that the life expectancy of one of their bridges is 15 to 20 years. It does not become obsolete because of the fact that the structure is not in a sound condition, but it has outgrown itself, or the traffic it has to bear has gone beyond its design.

Q. Let me ask you this then. You cannot give us any estimate [118] of the life expectancy of this bridge then; is that right?

(Testimony of W. J. Dorner.)

A. Well, I would say the bridge should last 50 years.

Q. Fifty?

A. Surely, there is lots of bridges around that are 50 years old giving satisfactory service, steel bridges.

Q. You think this one would have lasted that long, do you?

A. With proper maintenance, yes, it would.

Q. All right now, I just want to ask you this. It has been repaired now, and it is in use, isn't it?

A. That's right.

Q. And heavy traffic is going over it, isn't it? The same traffic is going over it as went over it before, isn't it?

A. That's right.

Q. Well then, in its present repaired state is its life expectancy any less than it would be if you did all this expensive work of putting a falsework under there and a new camber and all that?

A. I would say yes.

Q. That's all I want to know. Thank you.

Mr. White: No questions.

Mr. Lister: That's all.

The Court: Have you any other witnesses, Mr. Lister?

Mr. Lister: I am going to call Mr. Chandler. I have one other.

The Court: We will take a ten-minute [119] recess.

(Thereupon, at 3:45 p.m., a recess was taken.)

The Court: By agreement of the attorneys, we will now recess until nine-thirty tomorrow morning.

(Thereupon, the trial was recessed to 9:30 a.m., Friday, January 26, 1951.) [120]

Morning Session

(Friday, January 26, 1951, 9:30 a.m.—trial resumed.)

The Court: Mr. Lister, you may proceed.

Mr. Lister: Call Mr. Chandler.

E. M. CHANDLER

called as a witness in behalf of the plaintiff, and, having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Lister:

Q. You state your name to be E. M. Chandler; have you not? A. Yes, sir.

Q. What relationship do you bear to this Oregon-Washington Bridge Company?

A. Well, I am president and its engineer in charge of the bridge since it was started.

Q. What, if anything, do you have to do with building, with this Hood River-White Salmon Bridge?

A. Well, I originated the idea of the bridge in the first place, designed it, raised the money, built

(Testimony of E. M. Chandler.)

it and operated it ever since, and also rebuilt it on account of Bonneville Dam.

Q. When was it first built?

A. It was opened to traffic in December, 1924.

Q. When did you say it was rebuilt?

A. Well, that was over a series of years. In fact, it is not [121] quite completed yet, but the liftspan was completed in April, 1940.

Q. What did you do before you became, before you started in to work with this bridge project? What schooling have you had, Mr. Chandler?

A. Well, I graduated in civil engineering from the University of California over 40 years ago and have been engaged in engineering or the administration of engineering projects ever since.

Q. Can you give us any specific work you have done other than the work on this particular bridge project?

A. Well, the job immediately preceding the work on this bridge was executive—I had the detail, acting secretary, and I was executive officer of the American Society of Civil Engineers in New York.

Mr. Wood: Pardon me. Is the purpose of this to show he knows all about bridges? Because if you want, I will admit that he knows all about bridges.

Mr. Lister: All right.

Q. (By Mr. Lister): Mr. Chandler, you supplied me with a blueprint here. May I present it to you for your inspection.

(Testimony of E. M. Chandler.)

(Document, blueprint of Hood River-White Salmon Bridge, marked Libelant's No. 14 for identification.)

The Court: Have you seen the exhibit, Mr. Wood?

Mr. Wood: I saw it just briefly yesterday, [122] yes.

Mr. Lister: Didn't we show it to you in your office that day, too; Mr. Wood? I think we did.

Mr. Wood: At any rate, I am not going to object to it.

The Court: Are you offering it, Mr. Lister?

Mr. Lister: We offer that.

The Court: All right.

Q. (By Mr. Lister): What is it, Mr. Chandler, that is marked Libelant's Exhibit No. 14?

A. This is Sheet No. 35 of our set up plans for the liftspan installation. It's the general plan.

Q. Of the Hood River-White Salmon Bridge?

A. No, the general plan of the liftspan installation which was carried out as a separate job.

Q. For what bridge?

A. For the Hood River-White Salmon Bridge.

The Court: When was that——

Q. (By Mr. Lister): Did you prepare that, Mr. Chandler; did you have that prepared?

A. Yes, it was prepared either by me or under my direction. I didn't do all that work, of course.

Q. Now what does that show with regard to the bridge as in relation to the condition of the bridge

(Testimony of E. M. Chandler.)

on June 13, 1950? Didn't you tell me there were a few differences there? For instance, where is your toll house there as compared to where it was in June, 1950? [123]

A. Well, on this plan the toll house is shown to be on the first span north of the liftspan. It was constructed that way, but in 1949 we moved it to the center of the liftspan.

Q. All right, what, if any, other changes are there in the bridge as it was in existence on the 13th of June, 1950, that is different from what is shown there on that Exhibit 14?

A. Well, for the moment I can't think of any.

Q. All right now, can you show us then on that liftspan where the toll house is located, on the Exhibit 14 where the toll house is located?

A. Yes, do you want me to show it physically?

Q. Describe it.

The Court: Make a mark.

Mr. Lister: Mark it some way.

The Witness: It's located right in the center of the liftspan. (Marks on exhibit.)

Q. (By Mr. Lister): How did you mark it?

A. I marked it with a circle right at the center of the liftspan.

Q. Now, that's the toll house?

A. That's the toll house.

Q. Now where is the control house?

A. Well, we called that the operator's house. It is in the north tower up about 25 feet above the roadway.

(Testimony of E. M. Chandler.)

Q. Can you identify it by a mark?

A. Well, it is shown on the drawing. [124]

Q. Is it described by, what letters are there?

A. Well now, there are no letters. It's just illustrated as to how it looks.

Q. Is it marked though so that anybody looking at that exhibit can identify the control house that we have been talking about here in evidence?

A. Well. I should think so.

Q. Well, kindly mark it some way so that there will be no mistake about it. A. All right.

Q. Put an "X" there, Mr. Chandler.

(Witness marks on exhibit.)

A. All right, I put an "X" there and marked it "Operator's House."

Q. That's the same that has been referred to in evidence as the control house or control tower?

A. Yes, I believe they have been calling it that here.

Q. All right now, does that drawing show the various members of the bridge that would be between that toll house on the downriver side of the bridge?

A. Well, yes, it shows the frame work of the tower.

Q. Can you tell us just what was the situation on June 13, 1950, with regard to obstructions or any of the bridge members or anything like that that would be between the toll house and the downstream—— [125]

(Testimony of E. M. Chandler.)

Mr. White: Your Honor, I object to that question on the ground that this plan speaks for itself, if it shows that, and what Mr. Chandler can add to it is immaterial.

The Court: Well, it may be difficult to tell from the drawing itself. Let him explain the drawing.

The Witness: There is a vertical post, steel member right at the corner of the tower, the southwest corner of the tower, and there is also a diagonal member that would form a partial obstruction to the view.

Q. (By Mr. Lister): In what way does that diagonal member run?

A. Well, it starts at the bottom of the post, at the level of the operator's house, and goes in a diagonal direction up about 25 feet northward.

Q. Does it slant? A. It slants northward.

Q. Slants northward? A. Yes.

Q. It begins at the bottom of a post, you say, described as being at the southwest corner of the toll house? A. That's right.

Q. And then runs diagonal to the north?

A. That's correct, to the post on the northwest corner of the tower.

Q. Is that post substantially on the same plane north and south as the south post is? [126]

A. Yes, exactly.

Q. It is due north of the south post?

A. That's right.

Q. Now as that level of the bridge or the span raised would that put any additional obstruction

(Testimony of E. M. Chandler.)

between the person standing there at the operator's house and someone coming up river?

A. Well, not for a height of 13 feet.

Q. You have heard the description of the so-called catwalk or walkway around this toll house. Will you tell us how it appeared as far as you saw it?

Mr. White: May I ask if that appears on this plan? We will see the plan with the witness. Is that there?

Q. (By Mr. Lister): You have heard them tell about this walk on which Mr. Adams stated he tried to signal this equipment. Does that show on the plan?

A. No, this is the general plan. We have subsequent drawings which show the detail of it.

Q. Can you tell it, describe it to us without—do you need a plan or a blueprint to describe that part?

Mr. Wood: It seems to me it is already fully described, your Honor.

The Court: Yes, well, let him go ahead.

The Witness: Well, it's a wooden platform of fireproof material that was designed first off as a sort of porch or platform to get access to the operator's room. The door to that [127] room is on the east side or east end, and then the platform extends around the north side. It is quite narrow, about two feet, connects with the platform that is on the west side of the operator's house where there are three transformers that belong not to us but to the

(Testimony of E. M. Chandler.)

power people, originally Pacific Power and Light Company, now PUD of Klickitat County No. 1.

Q. (By Mr. Lister): Now could you say if one were standing on the south end of that platform what obstruction would there be between that person and one operating equipment up-river toward the bridge? Did you get my question?

A. I don't know if I understand it. Do you mean traffic on the river coming from upstream?

Q. No, if a person were standing on the southerly end of this platform as described by you and Mr. Adams, what obstructions would be between that person and the operator of a tug or—moving upstream toward the river easterly?

A. Well, as I have already described, there would be this vertical post in the tower and also one diagonal member.

Q. Well now, as I understand it, the platform extends southerly from the edge of the operator's—what do you call it, the operator's—

A. The operator's house.

Q. Operator's house. Where is this vertical post in regard to the southerly edge of the operator's house?

A. Well, it would be in a southwesterly direction, probably 20 [128] feet away.

Q. Well, with regard now to the southerly end of this platform, would the vertical post be north or south from that southerly end of that?

A. This vertical post would be south and west, mostly west.

(Testimony of E. M. Chandler.)

Q. How far west, Mr. Chandler?

A. Well, not over 20 feet.

Q. How far south?

A. Well, not over eight or ten feet.

Q. What about the dimensions of that upright, the member that you have described?

A. I don't remember, but it's pretty heavy. It carries the whole load, that is, one-quarter of the whole load of the liftspan, lifting it. I think, but it's only from recollection, I think it's probably an H section, 14 inches by 14 inches, carries a very heavy load.

Q. What would be the dimensions of this other member you have described?

A. Well, that would be much lighter.

Q. Give us your best memory?

A. I don't really remember, but it would not be half as big.

Q. I believe Mr. Dorner covered the length of that liftspan. Do you have the information there on that drawing?

A. Well, it's 262 feet 6 inches from center to center of the piers. [129]

Q. Now, when did you first get to the bridge after this action occurred on the 13th of June?

A. About two o'clock the morning of the 14th.

Q. What did you find when you got there?

A. Well, it was so dark I couldn't see very much of anything so I went to the hotel for about three hours, went back there and things looked pretty badly wrecked.

(Testimony of E. M. Chandler.)

Q. Just tell us what you found, what you saw at that time?

A. Well, the most noticeable thing immediately was the horizontal strut as it is called. That was knocked completely out.

Q. Where was that located now with regard to this Exhibit 14?

The Court: Now, Mr. Lister, as I understand it, Mr. Wood admitted the damages or admitted that certain repairs were done temporarily, and that they needed to be done.

Mr. Wood: That is correct.

The Court: So if the witness is going to testify as to the damage that was already repaired, it is superfluous.

Mr. Lister: All right, if that's the understanding of the Court, then we won't worry about that. Mr. Clerk, will you show the witness those exhibits, those pictures 1 to 11, please?

Q. (By Mr. Lister): Now, the No. 1, I understand you didn't yourself take the picture, did you?

A. It's the only one I didn't take.

Q. But you obtained that, did you not, from a photographer?

A. A photographer from a newspaper furnished it to me, newspaper [130] photograph.

Q. The others you took yourself? A. Yes.

Mr. Lister: We are going to offer those pictures in evidence, if your Honor please.

The Court: They are already received.

(Testimony of E. M. Chandler.)

Mr. Lister: I didn't understand they were received.

The Court: Are you offering the blueprint?

Mr. Lister: Yes, I did offer that, if your Honor please.

The Court: You didn't permit me to rule on it.

Mr. Lister: I am sorry, I want to offer that in evidence.

The Court: It may be received.

(Thereupon, the document formerly marked Libelant's No. 14 for identification was received in evidence as Libelant's Exhibit No. 14.)

Mr. Wood: Apropos of that, your Honor, the Reporter called my attention, or the Clerk did, we offered yesterday the statement of Mr. Adams, a written statement, and it was marked as Respondent's Exhibit 1, but they called my attention this morning to the fact that your Honor did not formally admit it, so I would like that done now.

The Court: Well, Mr. Wood, I believe that Mr. Adams admitted that he made the statements which are contained in the written statement. Having so admitted it, I don't know whether the actual statement itself is admissible. It was done for the [131] purpose of impeaching Mr. Adams.

Mr. Wood: That's right.

The Court: He has admitted that he made that statement.

Mr. Wood: That's right.

The Court: Now, what evidentiary value——

(Testimony of E. M. Chandler.)

Mr. Wood: If that's the situation, I think you are right.

Mr. White: My thought, your Honor, is that while Mr. Wood did call the witness' attention to one particular item, that statement is in several other respects, to the best of my recollection, inconsistent with the other phases of his testimony.

The Court: Yes, but then it is up to you or Mr. Wood to interrogate the witness about that. He is here.

Mr. Wood: I think your Honor is right on that.

The Court: You may proceed.

Mr. Lister: Those exhibits were offered yesterday, all those exhibits have been offered as I understand?

The Court: That's right.

Q. (By Mr. Lister): Mr. Chandler, I think one of those pictures shows the point of impact, doesn't it?

A. Yes, the one that is marked No. 6 shows where the railing is broken and the wheel guard and other damage.

Q. Does that show the toll house? A. Yes.

Q. Well, what I want to ask you now, where is that with regard to the middle of the lift span, the point of impact there? [132]

A. Well, it is just a short distance north of the center of the lift span?

Q. Of the lift span? A. Yes.

Q. With regard to the middle of the bridge,

(Testimony of E. M. Chandler.)

where is the lift span? Is the lift span right in the middle of the bridge?

A. Well, not exactly. I have another picture here that illustrates that. It is marked No. 10.

Q. Is the lift span across the channel of the river?

A. Yes, it was divided, the center of the lift span is theoretically the boundary line between the two States.

Q. That's supposed to be the center of the stream?

A. Well, it was the center of the thread of the current at the time the bridge was built. The river has been changed now on account of the Bonneville Dam somewhat.

Q. Mr. Chandler, do you have that list where we have the itemized breakdown of the cost of the permanent repair?

A. No, all the papers are in front of you.

Q. Will you show this to the witness, Mr. Clerk?

(Document, listing temporary repairs marked Libelant's No. 15 for identification.)

Q. (By Mr. Lister): You are looking now at a paper that is marked Libelant's Exhibit 15?

Mr. Wood: May I interrupt. Your Honor, this is a list of repair items that were testified to yesterday. I don't know [133] what the purpose now is of showing it to Mr. Chandler, but if the idea is to show that they were necessary and reasonable, I don't care to have him go over every item again.

(Testimony of E. M. Chandler.)

If Mr. Chandler would look at that paper and say these are the items of temporary repairs that were necessary and reasonable, why, that's all I care about.

Q. (By Mr. Lister): Will you look at that list, Mr. Chandler? A. Yes, I have.

Q. Does that represent the outlay for temporary repairs on the Hood River-White Salmon Bridge?

A. Yes, I called it emergency repairs, and I prepared this statement.

Q. And have all those items been paid by you?

A. Yes, by the Bridge Company.

Q. Were those various items that go into that list necessary to, as you say, make emergency repairs to this bridge? A. Absolutely.

Q. Were the charges fair and reasonable for the work? A. Very much so.

Q. There is one or two items on there that Mr. Dorner didn't mention.

The Court: Well, then, Mr. Wood is not asking you to explain those items.

Mr. Lister: All right.

The Court: It may be admitted. [134]

(Thereupon, the document previously marked Libellant's No. 15 for identification was received in evidence as Libellant's Exhibit No. 15.)

Mr. Wood: I only wanted him to say whether or not they were all collision repairs and nothing else included.

The Court: Is that true, Mr. Chandler?

(Testimony of E. M. Chandler.)

The Witness: Well, yes, there might be one exception. I have got a small item here, \$4.00 for photographs. One of them is in the exhibit here. That's the only exception I can think of.

Mr. Lister: Will you present this to the witness?

The Court: All right, show it to Mr. Wood, first.

Mr. Wood: Those are the Bridge Regulations. The Court takes judicial notice of them anyway.

(Document, Bridge Regulations, marked Libelant's No. 16 for identification.)

The Court: Are you offering it?

Mr. Lister: Yes, Libelant's Exhibit 16.

The Court: It may be admitted.

(Thereupon, document previously marked Libelant's No. 16 for identification was received in evidence as Libelant's Exhibit No. 16.)

Q. (By Mr. Lister): Now, Mr. Chandler, did you keep a record of the times the bridge up there, the lift span, was raised for traffic?

A. Well, it's a requirement of the War Department that we keep [135] a log book and put a record in it of every time it has been opened for any commerical purpose.

The Court: Hasn't that been admitted already? Had not the Respondents agreed that the plaintiff has inspected the lift body and that the only cause of the accident was the power failure?

Mr. Wood: I think that is substantially true. The Regulations require them.

(Testimony of E. M. Chandler.)

Mr. White: Yes.

Mr. Wood: The Regulations require them to make frequent tests of this lift span to see if it is working all right. Now, I don't know whether they did or not, but they have testified that they made a test two or three days before this and everything worked all right, and the only cause was the power failure. We have got no evidence to dispute that.

The Court: No need of going into that any more, Mr. Lister.

Mr. Lister: All right.

Q. (By Mr. Lister): Mr. Chandler, has there, at any time prior to June 13, 1950, has there at any time been any failure of this lift span to operate properly?

A. Well, there have been several times when it has been out of service, and we have notified the War Department, also a list of users of the river that the War Department has given us, that it was out of commission for one reason or another. For example, when we changed the location of the toll operator's house we had [136] to do a lot of wiring——

The Court: What purpose is that for, Mr. Lister?

Mr. Lister: If your Honor please, Mr. Wood will contend, I understand, and the defense he seems to rely upon to the effect that we should have been advised to have had some kind of auxiliary equipment there to notify and warn this oncoming tug and its tow.

(Testimony of E. M. Chandler.)

Mr. Wood: Yes, we make that contention.

Mr. Lister: All I wanted to ask this witness is what has been the experience there, if they had any thing to put them on notice that a warning device be needed.

The Court: I think, perhaps, you ought to confine your questions to the number of power failures that took place prior to this time.

Mr. Wood: I would not think it ought to be confined to that, your Honor, because anything that impaired the lifting of that span, whether it was their own machinery getting out of order, which might happen, or power failure or anything else, would require them to have some auxiliary or some kind of notice there to signify——

The Court: Well, I don't believe, Mr. Wood, that merely because the span has operated in the past is any indication it may not fail in the future.

Mr. Wood: I don't either.

The Court: So that if a auxiliary horn or some signal is [137] the standard of care is applicable, if you have it, regardless of whether the span operated in the past, I don't know whether that is necessary under due care, but you can go ahead and show what you want.

Q. (By Mr. Lister): Well, Mr. Chandler, will you tell the Court whether or not at any time—go ahead, you said that at one time you had to stop the movement of traffic because you were moving the toll house?

A. Yes, we have had to shut down operation of

(Testimony of E. M. Chandler.)

the lift span. That is, it was inoperative on account of repairs in several cases for some periods of time, but we make, we notify the War Department and also the users of the bridge in accordance with the requirements of the War Department.

Q. Well now, you said you moved the toll house. Did you ever have a failure because of lack of power for this bridge to operate, so far as you know?

A. Yes, when the installation was first completed we built this high-powered line, 6600 volts with a metal conduit passing into the bridge on the Washington side about half a mile north, and every time there was an electrical storm on the system, which was quite often, we would get a short circuit in it, and we finally had to abandon it and take all of the wires out of this conduit and put them on brackets that were attached to the bridge, and since then we have had no trouble from that source. In other words, separate the wires instead of having all three of them come [138] close together inside of that one metal conduit.

Q. Where there any other?

A. I can't think of any other. We were shut down several times, for several weeks, making this installation, changing the lift span, but there has never been any failure that I have any knowledge of in connection with the actual operation of the lift span. When we start to lift it, why, it is lifted.

Q. Those that you related are the only failures

(Testimony of E. M. Chandler.)

of any kind or any that you can remember now; is that correct? A. That's all I can recall.

Q. Now, what did you have there in the way of signals for people who were moving traffic through this span? What was the situation with regard to signals? A. You mean for river traffic?

Q. Yes, sir.

A. Well, in designing this lift span, it was done in conjunction with the War Department because they paid for it by means of special authorizations of Congress. We exercised the greatest possible care in trying to figure out every possible contingency, and answering your question more specifically, we installed a light in the center of the lift span so that when you start to lift the span it goes on automatically and remains red. When the lift span goes clear to the top it turns green. Now, this span was designed for ocean-going vessels. Unfortunately, there have been none since the span was built, and it has only been used since for [139] crossings or lifts something similar to this where a pile driver derrick or something like that that needs a little lift to let it through, and in most cases and in practically every case except one, it has not been lifted to the full height, and so there is a light appearing in the center of the span.

Q. What is the nature of that light?

A. Well, it is inside a receptacle, that is, a sort of a cylinder whereby it has a glass on the downstream side, another on the upstream side, that re-

(Testimony of E. M. Chandler.)

flects, a reflector inside so that it is quite a bright light.

Q. Well, were there any lights on the ends of the piers?

A. Lights are on the piers, but they are turned on manually at night so as to guide the navigation so that they can see the piers and not run into them.

Q. How would that light on the bridge there, for instance, compare with one of these traffic control lights in the street intersections?

A. I would say it was much brighter. I have seen it riding by on the Union Pacific train. That's quite a ways away.

Q. What did you have there in the way of a horn or a whistle or device of that kind?

A. Well, our plans called for, and it was installed, an air whistle. It's a very loud one that is operated by a motor and a compressor, but, of course, it was inoperative in this case because the power was off. [140]

Q. Well, did that operate on the same, from the same power that ran your lift to the bridge?

A. That's right.

Q. Was there any other power there available?

A. Any other?

Q. Was there any other electrical energy available there on the bridge when this power failed?

A. No.

Q. What, if any, procedure did you use to notify traffic to come on when you had the bridge in position for the traffic to move under the lift span?

(Testimony of E. M. Chandler.)

A. You are speaking of river traffic?

Q. Yes, sir.

A. Well, it had become a standard practice to blow the whistle twice, two short whistles, before the river traffic started to go through.

Q. Was this the whistle you were speaking about, the whistle you mentioned a while ago being a loud shrill whistle? A. Yes.

Q. Now, will you tell us, Mr. Chandler, are you familiar with the bridge in its present condition after these so-called emergency repairs had been made? A. Yes, very familiar.

Q. All right, have you made some estimates as to the cost of doing the additional repairs to put it back in the condition it [141] was before this accident? A. Yes.

Q. Do you have those available?

A. Well, I am—I have not got them. I think you have them.

Mr. White: Is this in addition to what the testimony has been? Is this some new damage, or is this recapitulation?

Mr. Lister: No, this is additional.

Q. (By Mr. Lister): Could you help me find that, Mr. Chandler? I think I have it now. Would you need all those papers?

A. I don't know what you want, what you are going to ask me, but I might.

Q. Will you take a look at those, Mr. Wood?

Mr. Wood: Are these the same things?

Mr. Lister: Yes, those are the ones we showed

(Testimony of E. M. Chandler.)

you down there when Mr. Chandler was down there, and they are substantially what Mr. Dorner testified about yesterday.

Mr. White: Why put them in twice?

Mr. Wood: Why are you going to put them in?

Mr. Lister: Well, are you willing to accept Mr. Dorner's testimony without any corroboration?

Mr. White: We don't have to stipulate to it, but it is in there.

Mr. Wood: No, I am not willing to accept his testimony that all this was necessitated because I think they could have used the bridge a long, long time without it. [142]

The Court: Well, let him put it in.

(Document, summary of cost of additional repairs, marked Libelant's No. 17 for identification.)

Q. (By Mr. Lister): You are looking at a paper which has been marked Libelant's No. 17. What does that represent, Mr. Chandler?

A. This is a summary of estimated cost of additional repairs which I have referred to as permanent repairs.

Q. Now, does that include the item that Otto Herman testified about yesterday?

A. Yes, he has the items in this estimate.

Q. What are the additional items there?

A. Well, one is electric repairs, \$500; another is railing the toll house, \$150; and another is repairs to steel, \$3,710.

(Testimony of E. M. Chandler.)

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(Testimony of E. M. Chandler.)

Mr. Wood: Repairs to steel?

The Witness: Yes, steel work, repairs to the bridge, the steel work on the bridge.

Q. (By Mr. Lister): Now, those items which you have mentioned in addition to what Mr. Hermann testified to make up the total; do they not?

A. Yes, they make up the total of \$23,710.

Q. Will you state whether or not those costs are necessary to put the bridge back in the condition it was prior to this accident? A. Yes.

Q. As a matter of fact, you have done one item of that already, [143] have you not?

A. Well, one small item, the railing of the toll house.

Q. How much did you estimate that?

A. It's estimated here \$150.

Q. What did it cost you? A. \$154.

Q. How about the electrical repairs, have they been made yet?

A. No, they have not been made.

Q. Is there any way that this repair that you now said was necessary can be done without doing the work that Mr. Herman has estimated will have to be done in the way of lifting up the bridge?

A. Well, there is another way of doing it, but it costs a lot more money.

Q. How would you do it other than by lifting—how could you do it?

A. Well, the other way, which isn't practical at all on account of the cost—

Mr. Wood: Well, we object to it, and if it will

(Testimony of E. M. Chandler.)

save time, if it's a more expensive way, we don't care about it.

Mr. Lister: All right.

Q. (By Mr. Lister): Now, Mr. Chandler, why do you have to put in this extra work? The bridge is being used now, isn't it? A. Yes.

Q. Why isn't it all right the way it is? [144]

A. Well, it's quite a long story to explain. If you want me to do it I will. This lift span was originally a simple span that was part of the original bridge finished in 1924. It had a wooden roadway and timber stringers, and when the War Department wanted it converted into a lift span, why, we put in steel stringers and the steel floor, open grid floor, and reinforced the span so that it could take the additional strain of being a movable span instead of a fixed span, and in other words, spanned the jar, and in doing that we straightened it so that it would carry the normal State Highway loading, what they referred to as H-15 loads.

Q. What is that?

A. It is merely what is known as H-15 loading. It is standard highway bridge loading, and the rest of the bridge was designed for what would correspond to H-12 and a half loading. In other words, it was lighter. This was the best part of the bridge as a result of those repairs and alterations. Now at the present time out of the 20 spans on the bridge, this is by far the poorest one because it has been weakened by these emergency

(Testimony of E. M. Chandler.)

repairs, and I can tell that, and I have observed it many times the way heavy traffic acts on the bridge with respect to vibration, and you can feel a certain amount of deflation or slight drop in the center of the span as a very heavy load comes on. What I am trying to make clear is that before this collision that span was very stiff and would carry anything allowed on the highways. [145] Now it does not.

Q. How long was it, Mr. Chandler, from the time this accident happened until the bridge was put back into unrestricted use?

A. Well, I think the date was the 20th of July.

Q. In the meantime, what restrictions were there on the use of the bridge?

A. All loaded trucks were prohibited, and we had signs in the roadway at each end of the bridge or near each end of the bridge to that effect.

Q. Have you advised yourself as to the amount of loss of revenue you had during the time this bridge was under the restricted use?

A. Yes, I made a very careful analysis of the whole situation and compared it with traffic the year before and traffic before the accident and traffic after the accident.

Q. What did you determine was your loss of use there?

A. Well, I made a report that, in my opinion, a hundred dollars a day was a very fair statement. If it was anything, it was an understatement of the loss.

(Testimony of E. M. Chandler.)

Q. Now, as I recall, the bridge was actually in restricted use for some thirty-five or six days, wasn't it?

A. Thirty-seven days was what I had in mind.

Q. And you in figuring your loss of use, did you include the full 37 days?

A. No, we deducted Sundays and we had one holiday, 4th of July, in which trucks are not much of a factor. [146]

Q. Did you deduct those days in figuring?

A. Yes. In other words, I figured the loss on the basis of 31 days.

Q. In doing that you left out the Sundays and holidays; is that true?

A. That's right.

Q. I think you may cross-examine. Well, may I ask, I think I can ask this question. Was that period of time, that 37-day interval, was that necessary and proper in order to get the temporary repairs made and the bridge back in use without restrictions?

A. Yes, in fact, we were very fortunate to get it done that quickly and as successfully as we did.

Mr. Lister: You may cross-examine.

Cross-Examination

By Mr. Wood:

Q. Mr. Chandler, if the pertinent repairs are so necessary to put the bridge back in its original condition, why have you delayed all this time doing that?

A. Well, I have had a lot of experience in dealing with the Columbia River at this particular site,

(Testimony of E. M. Chandler.)

and the nearest practical time to start doing that work would be immediately following the next high water, and we cannot do it at all until we get a permit from the War Department.

Q. Have you applied for that permit? [147]

A. No, I have inquired of them as to just what would be necessary to supply, and, it is necessary to specify the exact time we expect to have the river closed in the application, and the time that would be the best time to do it would be immediately following high water this year.

Q. Well, you had low water last year after this accident. Why didn't you do it then?

A. Well, we didn't have time. It was the latter part of July before we had these emergency repairs done.

Q. Well, but the low water comes along in September, doesn't it?

A. No, it starts in August, but, you see, this falsework that was built out there won't stand up to ice, and it won't stand up to flood, either one.

Q. Well, you have no definite——

A. We have had our hands full with this. We cannot do everything at once.

Q. You have no definite plans yet for making the repairs, have you?

A. Yes, we have definite plans for a definite estimate made at that time.

Q. I mean, you have no definite plans in your mind as to when or how you will make them, have you?

(Testimony of E. M. Chandler.)

A. The matter is out of my hands pretty much. It was sold in December.

Q. Who is going to make the repairs then? [148]

A. I assume the new owner.

Q. Suppose you succeed in this case, getting the amount you are asking for, \$30,000 or so, what are you going to do with it?

A. That's a matter of adjustment between ourselves and the new owners. They bought the bridge for \$50,000 cheaper than they otherwise would have because of this collision.

The Court: I don't think that would make any difference, Mr. Wood. He is entitled to put it in the condition it was immediately prior to the accident.

Mr. Wood: Very well, I will pass over that.

Q. (By Mr. Wood): Now, you have described somewhat on Mr. Lister's questioning the red light that was on the center of the span. What significance do you attach to that? What has that got to do with this case, in your opinion?

A. Well, I think it has a lot to do with it.

Q. That's what I want to know.

A. The fact of the case is that we have a red light there when the lift span is in operation. Of course, at night we have it there also as—it's put on manually.

Q. Put on manually?

A. When you start the lift span the light goes

(Testimony of E. M. Chandler.)

on automatically. It turns green automatically when it gets to the top.

Q. It turns green when it gets to the top. Suppose it does not get to the top?

A. That's just it. It's still always a red light if it stops [149] before you get to the top, but we have taken care of that. That is, it has become the custom by giving these signals, two blows of the whistle.

Q. All right, Mr. Adams says that he seldom lifted the span clear to the top. That's correct, isn't it?

A. That's right.

Q. And it was only when you lift the span clear to the top that the light would turn green?

A. That's right. This was built for seagoing vessels.

Q. Yes, so if it was lifted up 80 feet, or whatever it is, not clear to the top but sufficiently high for this tow to go easily under it, the light would be red, would it?

A. That's right.

Q. Still red?

A. Yes.

Q. Wouldn't change?

A. That's right.

Q. For that reason you now say it had become the practice for the bridge tender to blow two whistles for the boat to come in?

A. Yes.

Q. All right now, how do you know that? You were not at that bridge many times when boats were coming through, were you?

A. Yes, I have, I have spent lots of times at that bridge, and I have made particular point to be

(Testimony of E. M. Chandler.)

there when there was something going through to see its operation. [150]

Q. Mr. Adams never testified yesterday that he had any intention of blowing two whistles for the boat to come in, did he?

A. I don't know what he testified.

Q. You were here, weren't you?

A. Yes, I was here. He couldn't blow the whistle because the power was off.

Q. I know, but he never even intended to blow the whistle and didn't say so anyhow, did he?

A. Well, he is here. You better ask him, but I have watched the operation of the liftspan since this accident with a pile driver going through there, and not only was there two whistles blown but the operator of the pile driver put two men up on top of his tower, and he watched it closely to see if they had clearance enough. If anybody exercised that care there would never be any collisions.

Q. Now, Mr. Chandler, the War Department's Regulations govern the lifting and closing of this bridge and the signals and so on, don't they?

A. Yes, we are controlled by them.

Q. And the Regulations which are in evidence here do not say anything about that red light, do they?

A. No, I don't think they do.

Q. They don't say anything about blowing two whistles, do they?

A. No.

Q. And the subsequent Regulations that are now in effect and [151] were put into effect after this

(Testimony of E. M. Chandler.)

accident, still do not say anything about blowing two whistles to come in, do they?

A. Well, no.

Q. Well, do they? A. No, they do not.

Q. No, they don't, but what they do say——?

Mr. Lister: Just a minute, he has a right to explain the facts.

The Court: All right, they don't provide for the blowing of two whistles, but what do they do, Mr. Chandler?

The Witness: They provide now that nothing goes through the bridge unless it is flagged through with a green flag or green light, or at night with a lantern, and I am the one who made those suggestions to the War Department. The War Department asked me about my ideas. They asked me about a whistle. I told them that whistle was no good because when the power was off the whistle was no good.

Q. So the questions of the Regulations which were got up by you and the War Department in conjunction now provide for a green flag to be shown when it is safe for a boat to come on?

A. That's right.

Q. And a red flag when it is not safe to come on; is that it?

A. We don't show a red flag unless they start to come through anyhow, but they are not supposed to proceed through until they get a green flag in the day and a green light at night. In other [152]

(Testimony of E. M. Chandler.)

words, we are flagging them through now as a result of the accident.

Q. And a green light at night?

A. That's right.

Q. And if it is not safe to come through there is a red light shown? A. That's right.

Q. So the red lights are only for use at night, aren't they? And in the daytime they become flags; isn't that true? A. Well, now, yes.

Q. Now, at any time?

A. No, that was not the case before these new rules and regulations were in effect.

Q. Well, in the case of the older regulations there was no provision for anything, was there?

A. Well, I think I ought to, in justice, say that this red light was in the center of the span, at the time was put there as a requirement of the War Department and the U. S. Coast Guard at the time we designed the span, and all the other lights were put on there——

Q. There was not a thing in the regulations that said that if a signal fails that it should come through or not, was there?

A. I think you are right about that.

Q. And the only purpose of it was to show where the center of the span was to an oncoming ship at night? [153]

A. No, that was not the purpose of the red light. I should explain that right after this liftspan was completed in 1940, the War Department received a number of complaints about not having a green

(Testimony of E. M. Chandler.)

light in the center of the span because practically all the navigation does not require a liftspan. They go underneath, and the War Department declined to change it. In other words, they use a green light only when a liftspan is clear up.

Mr. Wood: That's all.

Cross-Examination

By Mr. White:

Q. Mr. Chandler, I am very interested in this whistle you mentioned. You said it had an air compressor on it. It was a compressed air whistle?

A. Yes.

Q. What was the tank, what size tank, how much compressed air did that tank hold?

A. I believe the contents of it were, I remember how the whistle sounded. It was very light.

Q. And the tank holds compressed air, doesn't it?

A. I assume so. It's a compressor.

Q. For use on the whistle?

A. Yes.

Q. And the only electricity involved is compressing the air into the tank so that when you pull the cord on the whistle [154] air goes out and blows the whistle; isn't that right?

A. I assume so.

Q. Did you ever issue any instructions to your men to keep that tank full of air?

A. Well, no, that is handled automatically.

Q. Automatically?

A. Yes.

Q. Well, this man testified that when the power went off he pulled the whistle and nothing happened. Where was the air?

(Testimony of E. M. Chandler.)

A. Well, I judge that the air is compressed immediately when it is actuated through the switch. The motor runs, compresses the air, and then the whistle blows. It is done instantly. I am not too familiar with the mechanics of that whistle, if that's what you want to know.

Q. No, but it's compressed air, wasn't it?

A. That's right.

Q. You are familiar with that bridge, and you have a general familiarity with the whistle, don't you?

A. Well, except to the sound of it.

The Court: The witness has testified that he does not know whether it went on automatically or not.

Mr. Wood: What I am getting at——

The Court: I don't think he is a person who can answer the question.

Mr. White: It may be so, your Honor. Let me ask you this, [155] Mr. Chandler. Did you ever issue any instructions to your bridge tender to keep compressed air in the whistle tank?

A. No.

Q. Before this accident did you ever give any contemplation or thought as to what would happen if the power went out such as when this accident occurred? Did you ever reflect in your mind what should be done in such an emergency before this accident?

A. Well, no, I never contemplated this kind of an accident. If I did, the bridge would have been designed like a battleship to take that kind of a thrust, and it wasn't.

(Testimony of E. M. Chandler.)

Q. Your have had fuses blow out on your bridge occasionally?

A. Yes, that's the reason why we had an electrician there so that he could fix it immediately if this happened.

Q. And if those fuses blew out on the bridge have you ever given any thought that maybe fuses might blow out on other parts of the circuit not connected with the bridge before this accident?

A. Well, it's very unusual though to expect the main source of supply to fail although it does fail on occasions just like lights go out here in a thunderstorm.

Mr. White: May I tend it to the Court or show it to the witness?

The Court: You can do either one you want to. Let Mr. White present it to Mr. Chandler.

Q. (By Mr. White): I am very interested in Exhibit 14, I believe, the blueprint of the elevation. Is that the present location of [156] the control tower as you have indicated? I believe you said that. I just wanted to make sure.

A. It is marked "Operator's house."

Q. The control tower?

A. Yes, approximately, it's on the level, yes.

Q. That is the location? A. Yes.

Q. Now the catwalk around it is on the north side, on the east or up-river side, and on the west side, right? A. Yes.

Q. There is a catwalk around it? A. Yes.

Q. And on the west side you have transformers?

(Testimony of E. M. Chandler.)

A. Yes.

Q. Now those transformers are just opposite the control house proper and below the windows; isn't that correct?

A. Yes.

Q. So a person could go on the catwalk, that is, on the north side or the back side of the house to the down-river end, couldn't he, without being involved with those transformers?

A. Well, I could answer your question better if you didn't put on that last part. Mr. Adams and I after the collision, went around out there to see whether that could be done or not. Mr. Adams is a pretty large man, even larger than I. He had pretty much difficulty getting between that panel member because this [157] is too small an opening, but after he got out there there are 6,600 volt wires. You haven't a flag. You are holding a hat. We decided it was not a very practical thing to do.

Q. I see, but Mr. Adams didn't have a flag to wave at that time, did he?

A. No, not that I know of.

Q. Mr. Adams could have walked to the west end of the back walk, could he not?

A. Well, he could, but it—we had a sign there not to do it, 6,600 volts.

Q. At least there were no transformers there?

A. No, that's right, he had to crawl to get through.

Q. That's a two-foot walk, you testified?

A. Yes, but there is a steel panel member in the tower that obstructs passage.

(Testimony of E. M. Chandler.)

Q. You have had fuses blow out on your bridge occasionally?

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Q. That's a two-foot walk, you testified?

A. Yes, but there is a steel panel member in the tower that obstructs passage.

(Testimony of E. M. Chandler.)

Q. Did you get through?

A. I got through, and he crawled through.

Q. All right, at any rate, from that end, that is, speaking of the west end of the rear walk, there is an unobstructed view down the river according to this plan; am I right?

A. Yes, I think that's right.

Q. Coming now to the point where Mr. Adams testified he stood when he waved his hat, that is the up-river end on that east catwalk? In other words, the east, the southeast corner of the control house and possibly out a little, that is where that [158] renders an unobstructed view down the river, doesn't it?

A. No, it is partly obstructed view.

Q. Partly obstructed? A. Yes.

Q. By these members as indicated in this drawing?

A. This vertical member here and this panel member. I would like to explain this platform on the east side extends south and west down about here.

Q. And went about how far in feet?

A. Maybe four or five feet. I am just guessing.

Q. Well, that would put him right directly behind that vertical member that is 14 inches in width; is that right?

A. Well, yes, that would be—yes, that's right. I would like to explain that I went up there on that platform to see how much an obstruction there was, after the collision.

(Testimony of E. M. Chandler.)

Q. I haven't asked you a question.

A. Well, I am trying to tell the whole story.

Q. How wide is that—let me ask you this. When this span was lifted thirteen and a half feet the only way to get out to it would be to crawl a girder here; isn't that right? A. No.

Q. How would you get out there?

A. This girder goes up with the liftspan. Here is where the cable is attached.

Q. No, but to get to the control tower, how do you do that? [159]

A. Well, yes, the platform, he would have to climb on this horizontal steel member on the tower.

Q. Yes, to get out, and how wide is that horizontal steel member?

Mr. Lister: Is that an I-beam?

A. No, it is not an I-beam. It's probably a section, probably a foot or 14 inches wide in this case.

Q. Where would he leave the control platform to get onto that beam up on the east end, upward end? A. I assume that that is what he did.

Q. Then it's just a matter of stepping from that platform and then going along the top of that and crawling?

A. Yes, and after he got to that point his view down to the tug boat would be unobstructed.

Q. No, but I was thinking of the bridge, this platform. From the time you left the catwalk to walk across that span to get to the—to walk across this girder to get to the span how great a distance is that, about six feet?

(Testimony of E. M. Chandler.)

A. Something like that.

Q. And then from that point, if it was true that this liftspan was five or six feet down, if that was true, once you got out there you just jumped down onto the main deck of the span, couldn't you?

A. If it was only five or six feet you could, but it was about ten or twelve feet down. That would be quite a jump.

Q. Well, I mean it is a jump so you would land on the main deck [160] of that span, wouldn't you?

A. That's right.

Q. No more questions.

Redirect Examination

By Mr. Lister:

Q. Mr. Chandler, you started to say you did go up on this southerly end of this so-called catwalk and make observations to see what, if any, obstructions were between you and the down-river view. What did you find?

A. Well, I found that the obstruction wasn't very bad.

Q. Well, what do you mean?

Mr. Wood: He has testified to that, that there was one big beam and also a diagonal beam.

The Witness: That's right.

Mr. Wood: He has already testified to that.

Mr. Lister: That's all, thank you.

The Court: Have you another witness?

Mr. Lister: Yes, I have.

The Court: Is he here now?

Mr. Lister: Yes, sir.

The Court: We will take a five minute recess.

(Thereupon a short recess was taken.)

(Trial resumed.)

Mr. Lister: I would like to call Mr. Adams for just one question. [161]

OSCAR HERMAN ADAMS

recalled, and having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Lister:

Q. You have already been sworn, Mr. Adams, your name is O. H. Adams, isn't it?

A. Right.

Q. You are the gentleman who testified?

A. Yes, sir.

Q. What is the fact as to whether or not during the time you have been on the bridge any signals have been given to oncoming traffic before they came through that draw, before it goes through the draw?

A. Well, when I started to work on the bridge I worked under Tony Flynn. He was manager of the bridge at that time. He instructed me to always blow the whistle twice so to signal for a boat to come through.

Q. How long did you say you have been on the bridge?

(Testimony of Oscar Herman Adams.)

A. Oh, going on three years now. I think it will be three years in April.

Q. Has there ever been a time since you have been on the bridge when the traffic has gone through the draw that that signal has not been given?

A. No, sir.

Q. Did you contemplate giving that signal to this equipment on [162] the day of the accident?

A. Of course, when I got the bridge up at 30 feet we figured on doing it, yes.

Mr. Lister: That's all.

Mr. Wood: That's all.

(Witness excused.)

Mr. Lister: Call Mr. Morrison. [163]

GEORGE Y. MORRISON

called as a witness in behalf of the plaintiff, and having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Lister:

Q. Where do you live, Mr. Morrison?

A. I live in Hood River.

Q. How long have you lived there?

A. 28 years.

Q. Do you remember an occasion when the Hood River-White Salmon Bridge was struck by some equipment along in last June? A. Yes, sir.

(Testimony of George Y. Morrison.)

Q. When did you first notice the equipment that eventually struck the bridge?

A. I don't remember the date or the time of the day. I know where I was. I know what I saw, of course.

Q. Where were you?

A. I was at the top of the hill known as, coming down what is known as Serpentine Road which is, well, I am going to say opposite the bridge, but it is somewhat west.

Q. On the Oregon side? A. Yes.

Q. Did you at that time—what did you see moving on the river at that time?

A. I saw a barge, rather a tugboat pushing a barge with a long [164] boom sticking up about at that angle (indicating).

Q. Where was that equipment when you first noticed it?

A. It was just east of the mouth of the White Salmon River. I would not say how far.

Q. Where is that; is that downstream from the——?

A. That's downstream from the bridge, yes, sir.

Q. What did you do?

A. Well, I am always interested in any activity on the river. I used to have boats and things there, and I wanted to get a closer look at this. This looked like an interesting procedure and so I drove down and parked my car just east of what we know as the Consolidated Freightways Office, which is on the bank just above the railroad and much closer

(Testimony of George Y. Morrison.)

than I was at the top of the hill. I arrived, drove perhaps, two minutes at the most.

Q. With regard to the Oregon end of the bridge, where is this point?

A. Well, it is not, it was right angles, the point is—well, it is in town. If you know Hood River, it is before you cross the Hood River Bridge across Hood River. It is at a pretty good angle, and you have got a very good view of the river and the center span of the bridge from that point.

Q. Then did you continue to observe this equipment from that point?

A. I drove down for that purpose, yes, sir.

Q. Would you have any idea of the speed that equipment was [165] moving there in the river, Mr. Morrison?

Mr. Wood: I ask that he be qualified, if he knows, any familiarity with the speed of vessels first. Is he a navigator or been at sea?

The Witness: No, she was not going fast.

Mr. Wood: I object without a foundation laid.

The Witness: I would say it was a walk.

Mr. Wood: I move to have the answer stricken.

The Court: Qualify him more.

Q. (By Mr. Lister): Well, Mr. Morrison, you say you have lived in Hood River for 28 years?

A. Yes, sir.

Q. You say you have yourself operated boats on the river? A. Yes, sir.

Q. Have you watched that equipment move up and down the river quite often? Have you observed

(Testimony of George Y. Morrison.)

the speed of that equipment as it moves up and down the river? A. Yes, sir.

Q. Now with that background can you give us an idea of the speed of this tug and its tow on the bay on the day the accident happened?

Mr. Wood: I object to that for the same reason. I still think he is not qualified. He says he operated boats on the river. They may have been little launches, and he says he has observed ships going up and down the river, but that isn't any [166] particular reason for measuring their speed or other subjects as to the time it reached this point and the time it reached that point, and furthermore, the question does not say what time Mr. Lister is referring to.

The Court: Objection is sustained.

Q. (By Mr. Lister): Well, Mr. Morrison, you did observe this equipment, you say?

A. Yes, sir.

Q. From the time you first saw it until the time—did you see it until it actually came in contact with the bridge?

A. Well, there was a brief time there while I was driving from one point to the other where I naturally didn't see it.

Q. All right, you have described where you first saw it. Now when you again got to this point you have described where was this equipment at that time?

A. It was much closer to the bridge. It was

(Testimony of George Y. Morrison.)

probably 200 yards downstream, call it three hundred yards downstream from the bridge.

Q. Now do I understand that—were you conscious of the equipment in the river all the time from the time you first saw it until it——?

A. Well, I knew it was there, naturally, otherwise, I would not have driven down.

Q. What I am getting at, I thought you told me you watched it from the time you first saw it until the time it went into the [167] bridge?

A. Well, from the time I saw it when I was up there at the top of the hill until I got my parking near the Consolidated Freightways Office, naturally, there would be a time driving down hill and through traffic when I would not see it.

Q. How long did you say it took you to make the——?

A. Oh, two minutes at the most.

Q. With that exception of about two minutes, you saw it all the time; is that correct?

A. Yes, sir.

Q. All right now, did this equipment change its speed at all during the time you watched it?

Mr. Wood: I object to that. I don't think he could tell that.

The Court: It is going to be pretty difficult, but I am going to let him answer.

The Witness: In my opinion, it did.

Q. (By Mr. Lister): Did you see the actual impact between this equipment and the bridge?

A. Yes, sir.

Mr. Lister: You may cross-examine.

Mr. White: No questions.

Mr. Wood: No questions.

Mr. Lister: Thank you, Mr. Morrison.

That is our case, your Honor. [168]

The Court: You may proceed.

Mr. White: Your Honor, on behalf of the Crane Barge No. 25, at this time I move for a non-suit or a dismissal of the libel against the Crane Barge on the ground they have utterly failed to prove any negligence whatsoever in respect to the barge. There is no evidence. There is a picture in evidence that the barge was secured and there was a crane on top of it, and that is no evidence of any negligence whatsoever, and under *Sturgis versus Boyer*, which I am quite sure your Honor is familiar with, an unmanned tow, there is no evidence there was any man on it, the barge I am speaking of was without personnel. The control of command was under someone else, and there is absolutely no basis for any case whatsoever against the barge, and I ask at this time a non-suit.

The Court: Are you waiving your claims for damages against the bridge?

Mr. White: No, your Honor, I have a cross reply that I intend to pursue.

(Discussion off the record.)

The Court: I am going to take that under advisement.

Mr. White: Thank you, your Honor.

Mr. Wood: Should we call our witnesses?

The Court: Yes.

Mr. Wood: Call Mr. Stackhouse. [169]

EDWARD E. STACKHOUSE

called as a witness in behalf of the respondent Crane Barge No. 25, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. White:

Q. Mr. Stackhouse, where do you reside?

A. I reside in Portland.

Q. For whom are you employed?

A. Multnomah County.

Q. In what capacity?

A. Supervisor of Bridges and Ferries.

Q. How long have you been employed in that capacity? A. 18 years.

Q. What are your duties in connection with that job?

A. Well, to see that the bridges operate properly and are all kept in repair.

Q. You are familiar—there are four bridges under your jurisdiction in the County of Multnomah?

A. Four large bridges on the river here, yes, sir.

Q. They are on the river? A. Yes, sir.

Q. What arrangements do those bridges have for whistles in the event of a power failure?

A. I would like to qualify that last answer, sir. There is [170] more than four bridges, but I take

(Testimony of Edward E. Stackhouse.)

that for granted that you are asking about the ones that have lifts in them?

Q. Yes.

A. Because we have St. John's, Sellwood and Ross Island, we have a bunch of them, but those are the ones with the draw; is that it?

Q. Yes, as this draw. A. That is correct.

Q. What is the arrangement for whistles on those bridges?

A. They have an air whistle on those bridges, and with those whistles are controlled by air pressure.

Q. What are the tank sizes?

A. On three of those bridges we have 125-pound pressure tanks, air tanks, and on the Broadway we have 150-pound pressure.

Q. What means of putting air into the tanks is it, electricity?

A. No, we have the air pressure.

Q. Air pressure run by electricity?

A. Yes, that's right.

Q. If there is pressure on the tanks, the whistle can blow in spite of the fact that there may not be any electricity on the bridge; isn't that right?

A. Oh, yes, stores this pressure up in the tanks. It is stored. Of course, it depends on how long you blow the whistle how long the air will stay in there, naturally.

Q. It is the customary type of whistle you have on the bridge? [171]

Mr. Lister: Your Honor, we object to that testi-

(Testimony of Edward E. Stackhouse.)

mony as being improper, not tending to prove any issue in this case, calling for a conclusion of this witness, not connected up with this particular controversy in any way.

The Court: Well, the objection will be overruled. You may answer the question.

Mr. White: Would you read that last question?

(Pending question read by the Reporter.)

Mr. White: I will reframe the question.

Q. (By Mr. White): Is it customary, is the whistle which you have described on the bridges in Multnomah County, is that the type of whistle, the customary type of whistle to have on bridges on the Columbia River?

A. I would say it is. That's what we have, never have anything else but that type of whistle.

Mr. White: That's all.

Cross-Examination

By Mr. Wood:

Q. You testified that those whistles you operate independently of a power failure on a bridge, didn't you? A. That's right.

Q. For how long could you keep blowing those whistles in the event of a power failure?

A. I don't know as I can tell the exact hours that that would run, but it would last as long as this pressure was in the air [172] tank. It would be a considerable length of time.

Q. I just wanted to bring out the fact whether it's just a whistle and then would be exhausted, or

(Testimony of Edward E. Stackhouse.)

whether the pressure would last there for several hours.

A. No, it doesn't take very many pounds of air to blow the whistles when you have 125 pounds stored up, so it will last a considerable length of time. We could blow it a great many times.

Q. (By Mr. White): Would you say at least ten?

A. Oh, much more than that. They will last several days.

Mr. White: That's all I wanted to know.

Mr. Wood: That's all.

Cross-Examination

By Mr. Lister:

Q. Mr. Stackhouse, when do you use those so-called air whistles?

A. On the approachment of boats, when boats desire to go through.

Q. Do you always use them? A. Oh, yes.

Q. Do you signal a boat to go through a bridge?

A. That's right.

Q. And the boat does not come through until you signal them to do that?

A. That's right, they have to answer that signal to the boat.

Q. You give the boat a signal, and the boat has to answer before [173] it comes through?

A. The boat gives us a signal, and we answer that signal, and when we answer that signal, they have the all clear.

(Testimony of Edward E. Stackhouse.)

Q. And they do not come through until you have whistled?

Q. That's right, we give them that as an emergency whistle which means the draw will not rise and they are supposed to stop.

Q. Do you have any other whistle on the bridge?

A. No, but we have a spare or two in the shop, and if one goes out of order we can always change them.

Q. Just how many spares do you have?

A. About two.

Q. You have four bridges and two spare whistles? A. Yes.

Q. You have those because it is necessary to repair the ones that are on the bridges?

A. Once in a great while they get out of order. If they do, we take another one out, change, fix the other up ready to go.

Q. And if it gets out of order on an emergency basis you have to go to the shop and get your replacement; is that correct?

A. Yes, to get the whistle from the shop.

Q. If any emergency came up that for some reason or other your air had gone off, or did not work, do you have to go back and get your emergency whistle and install it and take the other one in for repair; is that the way you do it?

A. If the air had gone off there, wouldn't any whistle work so [174] there wouldn't be any use to go get it, but we see that that compressor works all the time.

(Testimony of Edward E. Stackhouse.)

Q. Well, they don't work all the time, do they?

A. Yes, they do.

Q. Well, I thought you said you had to take them in for repairs periodically?

A. We take another one out if it begins to get dim or low on the tone, so we figure it is not good. We take them in and clean them up.

Q. They are not foolproof, are they?

A. We have never had any trouble with any. I have been there for 18 years.

Q. You said you had a few spares?

A. That's right, we take them off once in a while, clean them up, see that they do work. They get dusty once in a while, and the sound isn't as clear as it should be.

Q. How many liftspans are there on the Columbia River?

A. There is four here in Portland.

Q. I am talking about the Columbia River.

A. I wouldn't know, sir. I only work in the county.

Q. I thought you answered a while ago it was customary to have this type of whistle on the Columbia River bridges?

A. I think it is, as far as I know.

Q. Do you know anything about Columbia River bridges?

A. Yes, some; I never worked on them. I don't know what kind of [175] equipment they have.

Q. You don't know whether the bridge at Longview has any similar equipment or not, do you?

(Testimony of Edward E. Stackhouse.)

A. I wouldn't know, no, sir; no, I wouldn't.

Q. You don't know whether the bridge between here and Vancouver has it, do you?

A. No, that belongs to the State Highway. I wouldn't know.

Q. You don't know what the bridge at, the White Salmon-Hood River bridge has, do you?

A. No.

Mr. Lister: Thank you, that's all.

Redirect Examination

By Mr. Wood:

Q. You told Mr. Lister just now that you didn't have a second alternative whistle on the bridges, but you do have another means of communicating from the bridges to a ship, do you not?

A. Yes, we have a speaking box or horn, you might call it, in case we have to speak up, to holler at them. If anything should happen, we have that there.

Q. Will that carry from the bridge to the ship?

A. Yes, it carries quite a ways on the river.

Q. Quite a ways. Have you had power failures on the bridges?

A. Oh, yes, we have those quite frequently.

Q. Quite frequently, that's all. These power boxes or these loud-speakers, they are not dependent on the electrical power [176] on the bridge, are they?

A. Oh, no, no.

The Court: Mr. Stackhouse, do you give signals

(Testimony of Edward E. Stackhouse.)

to oncoming traffic by reason of any regulation of the War Department?

The Witness: You mean the river traffic?

The Court: Yes.

The Witness: Yes, sir, that's under control by the Government.

The Court: In other words, when you signal a vessel to come through the bridge you do that because the regulations of the War Department require it?

The Witness: That's right, we run under War Department regulations on the river.

Recross-Examination

By Mr. Lister:

Q. Are those regulations peculiar to the bridges here in Portland, Mr. Stackhouse?

A. I wouldn't know, sir; I wouldn't know what the Government regulations, whether they are general all over the country or whether they just apply to certain zones of the river. I wouldn't know as to that.

Q. How do you know that there is a regulation at all?

A. Because we get this from the Government. The rules are laid down to us.

Q. Can you produce the regulations that requires these signals [177] on your bridges?

A. I believe the Roadmaster has them in the Court House.

Q. How long have those been in existence?

(Testimony of Edward E. Stackhouse.)

A. They have been there ever since I have been here. Whenever the Government lays down a rule we are supposed to follow it on a navigable stream.

Q. Well, that's just it. Are you now saying that there is a—have you ever seen these rules at all?

A. How is that?

Q. Have you seen these rules at all, yourself?

A. Yes, I have seen the communications from the Government, but I have not paid very much attention. They go to the Roadmaster, and I get my orders from him.

Mr. Lister: I would like to see those.

The Court: Well, you may get them during the noon hour. During the noon hour you can go to the Roadmaster's office. If you want to produce them you can produce the regulations. If you want to subpoena, I will give you a subpoena.

The Witness: The Roadmaster is George Buck.

Mr. Lister: Thank you, Mr. Stackhouse.

Mr. White: This witness may be excused, may he not?

The Court: Yes, Mr. Stackhouse, you may be excused now.

The Witness: Thank you, your Honor.

(Witness excused.)

Mr. Wood: Call Mr. Sadewasser. [178]

RICHARD SADEWASSER

called as a witness in behalf of the respondent Tug Lew Russell, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Wood:

Q. Mr. Sadewasser, you live in Washougal?

A. That's right.

Q. You work for the Russell Towboat Company?

A. Yes, sir.

Q. You went to work for them, I believe, in 1946?

A. Yes.

Q. In what capacity have you been working for them?

A. Pilot.

Q. Pilot, and what position did you occupy on the Tug Lew Russell on the occasion of the collision with this bridge?

A. As pilot in the wheelhouse.

Q. When did you go on watch; do you remember?

A. 6:00 a.m.

Q. Where were you in the river then, about where?

A. At Bonneville.

Q. Were you still piloting the vessel up to the time, up to the collision?

A. Yes, sir.

Q. Where were you on the tug? In other words, I don't know [179] whether the tug has a pilothouse or whether you were out in the open.

A. I was in the pilothouse.

Q. What speed were you cruising at, coming up the river?

(Testimony of Richard Sadewasser.)

A. Approximately four miles an hour.

Q. Four miles an hour. Do you know that fairly definitely from the time you passed the different points, let us say, from Bonneville up to Hood River?

A. Yes, sir.

Q. That is when you were going your full speed?

A. That's right.

Q. Now as you approached the bridge, what did you do in regard to the progress of your boat forward?

A. When we were approximately within a quarter of a mile of the bridge I stopped both engines, let them shut down until the bridge came to a stop. It started raising, and he came to a stop. I assumed that it was high enough and started the engines and proceeded at an idling speed to the bridge.

Q. I didn't hear what you said. You said at idling speed?

A. That's right.

Q. What do you mean by idling speed? I have never heard that phrase.

A. Well, on this particular type of an engine they have an, oh, a limit to the amount of turns you can slow them down to.

Q. Yes? [180]

A. You see, our cruising speed is 750 turns, and you are not supposed to run them any lower than 400 turns.

Q. When you stopped the engines about a quarter of a mile below the bridge did your tug and tow lose headway?

A. Yes.

Q. And you waited then for the draw lift to lift?

(Testimony of Richard Sadewasser.)

A. That's right.

Q. Can you give us any estimate of the time you waited there until the lift began?

A. Oh, I would say it was approximately two minutes, two or three minutes.

Q. So, I take it for granted you lost considerable headway then? A. Considerable.

Q. Well then, when the draw lift lifted you say it came to a stop? A. That's right.

Q. What did you do then?

A. I started both engines and proceeded ahead.

Q. Why did you start the engines? In other words, why did you assume it was safe to go ahead?

A. Well, the bridge had come to a stop, and that is the only procedure I had ever seen with that particular bridge. There were no signals given or anything else.

Q. Did it appear to you to be high enough to go through? A. Right. [181]

Q. Did you have any doubt about it?

A. No doubt whatsoever.

Q. Having come to this stop and then resuming your speed idling your engines, as you say, about what speed were you making when you came up to the bridge itself?

A. Oh, I would say between a mile and a mile and a half an hour.

Q. We have been speaking of these speeds without explaining whether you mean over the ground or through the water. A. Yes.

(Testimony of Richard Sadewasser.)

Q. That leads me to ask how was the current in the river?

A. Well, it was traveling at the rate of about five miles an hour over land.

Q. Then you were bucking a current of about five miles an hour? A. That's right.

Q. So when you indicate the speed of a mile and a half an hour you mean over the ground?

A. Over the ground.

Q. Now when did you see for the first time that you might not clear the span?

A. The end of the boom was approximately ten or fifteen feet from the bridge itself.

Q. Now why couldn't you earlier than that see that you might not clear it?

A. Well, the boom, I believe it was 110 feet long, and it was [182] considerably ahead of the boat, and it was higher than the wheelhouse, and I was down on the water, close to the water, and so far ahead that it is very hard to judge the distance at that.

Q. That's what I mean. I wanted you to explain to the Court if you can your difficulties of a man at a distance from the bridge and low on the water telling whether the lift is high enough when it's a quarter of a mile away or at any time up to the time you get to the bridge.

A. I don't believe I understand what you mean, sir.

Q. How high were you above the water in your pilothouse? A. Well, about 25 feet.

(Testimony of Richard Sadewasser.)

Q. That was considerably lower than the span as you came to a stop, wasn't it? A. Yes, sir.

Q. That's what I want to know. Is it difficult for you in that position, for you to tell whether there is sufficient clearance, or do you have to rely on the bridge tender?

A. I have to rely on the bridge tender, that's right.

Q. Now there was testimony here just this morning that it was the practice for the bridge to blow two whistles as a signal for a boat to come on. Did you hear that testimony?

A. Yes, I heard that.

Q. What have you to say about that?

A. Well, that is the third time that I have gone through that [183] bridge where it had to raise, and in the three times I have never heard a whistle, I have never heard that whistle blow in my life.

Q. Did you see at any time prior to the collision this bridge tender on the bridge? A. No, sir.

Q. After the collision did you see him?

A. Yes.

Q. Where was he then?

A. He was out on a span, in the center of the span.

Q. How near did the tip of the boom come to clearing the bridge?

A. Three feet at the very most.

Q. That is, if the bridge had been three feet higher he would have gone clear?

A. That's right.

(Testimony of Richard Sadewasser.)

Q. Oh, yes, perhaps I should ask you, the makeup of the tug and tow has not yet been described to the Court, I think. You might do that.

A. The crane barge was on the starboard side of the boat ahead of the boat, and the boat itself was hooked on behind a loaded gravel barge. The boat and the barge were on the portside or the left side and the crane barge was on the right side.

Q. When you say the boat you mean the Tug Lew Russell? A. That's right.

Q. That was pushing a gravel barge ahead [184] of it? A. Yes, sir.

Q. Directly ahead of it?

A. Directly ahead of it.

Q. So that the nose of the tug was against the stern of the gravel barge? A. Yes, sir.

Q. Then forward on the tug's right, but abreast of the gravel barge, was this crane barge?

A. Yes, and the crane barge extended considerably ahead of the gravel barge.

Q. Do you know approximately the combined length of the tug and tow?

A. I would say approximately 265 feet.

Q. I forgot to ask, when you were right up to the bridge and you saw for the first time that it might not lift, what did you do with your engines?

A. I stopped them and shifted the cams, which the engines are direct reversible. You have to stop them, shift what they call the cam shift and start them up again, and they were running full astern.

(Testimony of Richard Sadewasser.)

Q. In other words, as soon as you saw there was danger you stopped and reversed your engine?

A. Yes, sir.

Q. How close did you say the tip of the boom was from the bridge then? [185]

A. Approximately ten or fifteen feet, fifteen feet at the most.

Q. Now at that spot and against that current in what lengths could you have brought your tow to a standstill?

A. I would say half of the length of the tow.

Q. Did you hit the bridge with any great, severe impact? A. No, sir.

Q. I think it has already been testified before, but what part of the boom hit the bridge? I don't mean that, I mean what part of the drawspan, the middle or right or left, did the boom hit?

A. The boom hit just to the north of the center of the span.

Q. Just to the north of the toll house?

A. That's right.

Mr. Wood: That's all.

Cross-Examination

By Mr. White:

Q. Mr. Sadewasser, how long does it take you to put your vessel in reverse going at the speed you were doing at the time you approached the bridge?

A. Oh, just a matter of two or three seconds is all.

Q. Not more than two or three seconds?

(Testimony of Richard Sadewasser.)

A. That's right.

Mr. White: No further questions. [186]

Cross-Examination

By Mr. Lister:

Q. I didn't understand how you spelled your name?

A. S-a-d-e-w-a-s-s-e-r.

Q. Were you the only person on board this tug and tow? Did you have a helper?

A. The skipper was aboard, and also two engineers.

Q. How many?

A. The captain and two engineers were aboard.

Q. Altogether there were four of you?

A. That's right.

Q. I see; where were the other gentlemen?

A. I don't know where any of them were.

Q. Were any of them forward of you?

A. No, sir.

Q. On the tug or tow? A. No, sir.

Q. Were any of them on the tow or either of the tows? A. No, sir.

Q. Well, you know they were not there, don't you?

A. I know they were not on the tows, yes, sir.

Q. And as I understood it, the gravel barge is directly in front, and the crane barge with this boom on it was to the starboard or right of the gravel barge? A. Yes, sir. [187]

Q. Did I understand you correctly that the aft

(Testimony of Richard Sadewasser.)

end of both tows were substantially on the same line?

A. Well, there may have been eight or ten feet difference in the two——

Q. And the crane barge itself, was it longer than the gravel barge or merely the boom that stuck out ahead?

A. Oh, the crane barge itself was considerably longer than the gravel barge.

Q. What was on it other than the boom?

A. On the——

Q. What were you carrying on this crane barge other than a boom?

A. A small boat, a landing craft.

Q. Where was the small boat located with regard to the boom?

A. That was directly beneath the boom.

Q. What is that?

A. Directly beneath the boom.

Q. Why couldn't you have turned that boom around and had it extending backward downstream where it would have been more nearly even with the tow? A. I don't know.

Q. Had the boom been in this same position which you have described to the Court all the way up the river? A. Yes, sir.

Q. Where did you start; where did you pick the tow up? A. Vancouver. [188]

Q. When did you pick it up?

A. I believe it was approximately nine-thirty the 12th of June, p.m.

(Testimony of Richard Sadewasser.)

Q. Would that have been in the morning?

A. In the evening.

Q. You picked it up at nine-thirty at night?

A. Yes.

Q. Then did you come directly up-river to the scene of this accident? A. Yes, sir.

Q. Did you make any stops on the way?

A. That I don't know.

Q. Were you on the tow all the time?

A. Yes, sir.

Q. I mean on the equipment? A. Yes, sir.

Mr. Wood: He was not on watch all the time.

The Witness: No.

Q. (By Mr. Lister): But when you were on watch did you have living quarters there on the tug?

A. Yes, sir.

Q. When were you first on watch?

A. We work six hours on and six off. I was working from six until twelve, that shift, I believe it was.

Q. And you had the charge when you first picked it up at [189] Vancouver at nine-thirty?

A. Yes, sir.

Q. And ran to midnight? A. Yes.

Q. Where were you then?

A. I was in the wheelhouse.

Q. What I mean was, where was your tug and its tow? At what point on the river had you reached at that time? A. At midnight?

Q. Yes, sir. A. That I don't remember.

Q. Then you were off duty until six o'clock the

(Testimony of Richard Sadewasser.)

next morning; is that correct? A. Yes, sir.

Q. When you came on duty where were you?

A. At Bonneville.

Q. How do you get through there at Bonneville?

Do you have to go through the locks?

A. Yes.

Q. Had you gone through the locks before you took over? A. No.

Q. How far is it from Bonneville by river to this Hood River-White Salmon Bridge?

A. Approximately 20 miles.

Q. Twenty miles? [190] A. Yes, sir.

Q. When did you clear the locks at Bonneville?

A. 6:45 a.m.

Q. 8:45? A. 6:45 a.m.

Q. When did you have your breakfast?

A. At six.

Q. Did you have your breakfast before you went on duty? A. Yes, sir.

Q. Then did you proceed steadily on up-river from Bonneville to the—how did you go through the bridge at, what they call the Bridge of the Gods there? Did they have to lift that bridge for you to go through?

A. There is no lift at all on the bridge. It is high enough to clear anything that goes through there.

Q. You went through there without any—

A. No difficulty at all, yes.

Q. Were you in charge of the equipment then?

A. Yes.

(Testimony of Richard Sadewasser.)

Q. And continued in charge until you got to the scene of the accident? A. Yes, sir.

Q. Did you make any stops of any kind?

A. No, sir.

Q. You said you slowed down or—you said you slowed your [191] engines down to 400 revolutions, didn't you, when you were some distance below the——

Mr. White: I object to that as assuming something not in evidence, contrary to the testimony. He said he stopped his engines.

Q. (By Mr. Lister): What did you say?

A. I said I stopped the engines approximately a quarter of a mile from the bridge.

Q. What did you say about 400 revolutions?

A. When I re-started the engines, when the bridge had started to lift and stop I re-started the engines and ran them about 400 revolutions.

Q. Then your testimony is that you came up to this span a quarter of a mile downriver from the bridge, you were going at substantially 750 revolutions, and then you shut your engines off entirely?

A. That's right.

Q. Did I understand you to say you have two engines on this equipment? A. Yes, sir.

Q. Were both engines operating as your tug came up river? A. Yes, sir.

Q. You shut them both off, did you?

A. Yes.

Q. When you resumed you started both engines up, didn't you? [192] A. Yes.

(Testimony of Richard Sadewasser.)

Q. You said you were making four miles an hour at 750 revolutions, didn't you?

A. Yes, sir.

Q. Then when you resumed at 400 revolutions would you be making relatively the same speed? I mean, would your speed be at four miles per hour what 400 is to 750?

A. No, sir.

Q. Why wouldn't it?

A. I don't know.

Q. Well, are you sure that it wouldn't be?

A. Yes, I am positive.

Q. Why are you then? What is your basis of your positive position?

A. I stopped the engines a quarter of a mile from the bridge. The tow drifted or coasted. When you re-start them if I would have run along up to 750 turns it would take approximately 15 minutes to get up to that four miles an hour again, but being as I ran them only 400 turns a piece you can run them all day and you wouldn't get up to that speed.

Q. I appreciate that. How do you fix this distance at one quarter of a mile?

A. Just by judging.

Q. That's just a guess, isn't it?

A. That's right, it was—— [193]

Q. You said it was hard for you to tell where the end of this equipment was. It would be pretty hard to tell where the bridge was, wouldn't it?

A. No, sir.

Mr. White: I don't believe he testified to that. I object.

(Testimony of Richard Sadewasser.)

Q. (By Mr. Lister): Didn't you say in answer to a question on direct examination it was difficult for you to see as you, in the position you were as to the relationship between the end of the boom and the bridge, or words to that effect?

A. Yes, sir.

The Court: He testified to that.

Q. (By Mr. Lister): What is that, please?

A. Yes, sir.

Q. Well, wasn't it hard for you to tell the distance between the equipment and the bridge, too?

A. No, do you—may I ask you a question?

Q. Will you answer mine?

A. Do you mean the whole tow or the boom?

Q. Well, I am asking either, anyway you want to put it?

A. No, it wouldn't be hard at all.

Q. Now when you first turned your engines off had this liftspan started to move?

A. No, sir, it didn't start until after the engines were shut down completely.

Q. You said you had your engines idling or shut off, didn't you? [194]

A. Completely off.

Q. For two or three minutes; is that correct?

A. Yes, sir.

Q. In that two or three minutes what happened in regard to the bridge?

A. Well, after they were shut down for a little while the bridge started to raise, and then the bridge came to a stop and then I started the engines again

(Testimony of Richard Sadewasser.)

Q. As the bridge raised did you see any lights on it?

A. Not from a quarter of a mile, no, sir.

Q. I am asking you, though, did you see any lights on the bridge at all? A. No, sir.

Q. At any time? A. No, sir.

Q. You said you had been through the bridge on two other occasions, or was this, or three other occasions? A. Two other occasions.

Q. When you went through the bridge on those two other occasions did you see any red light in the center of this liftspan?

A. If I remember correctly, they were both in the daytime, and I didn't see them, no.

Q. Well, what are you saying, that you don't remember whether you went through in the daytime or not?

A. That's right, it was over a period of several years. [195]

Q. Well, you would surely know whether it was daytime or night, wouldn't you?

A. I can't remember for two or three years back.

Q. Well, Mr. Sadewasser, do you actually remember having gone through there at all?

A. Yes, sir.

Q. Well, if you had, don't you remember when you did? A. No, sir.

Q. Do you remember what kind of equipment you had? A. Yes, sir.

Q. Who you were working for?

A. Yes, sir, I know who I was working for.

(Testimony of Richard Sadewasser.)

Q. Well, don't you know whether you went through in the daytime or night?

A. On one occasion I went through in the daytime.

Q. Are you sure of that? A. Yes, sir.

Q. Now, when was that?

A. I don't remember.

Q. Well, with regard to this accident, was it before or after?

A. Oh, it was before, considerably.

Q. How long before?

A. I would say two years.

Q. Three years? A. Two. [196]

Q. How long have you been working on the river?

A. I worked on the river for a little less than nine years.

Q. How long have you worked for Russell Towboat and Moorage Company?

A. Approximately five years.

Q. Well, are you sure now if there had been a red light in the center of this span on the day of this accident, were you in a position to see it?

A. Yes, sir.

Q. And are you willing to say there wasn't any there or you didn't see it?

A. I will say I didn't see it.

Mr. White: Are you referring, Mr. Lister, to the light being on or just seeing the light.

Mr. Wood: He has already answered.

(Testimony of Richard Sadewasser.)

The Court: The witness has answered the question.

Q. (By Mr. Lister): What is the technique in stopping and reversing these engines, Mr. Sadewasser?

A. You shut them completely off, and you just have four levers right in front of you. You pull two of them back, and your engines stop. You pull the other two back, they are in reverse. You start them up again, and they are in reverse.

Q. You don't really stop the engines?

A. Yes, the engine stops completely.

Q. How does it start after it stops? [197]

A. By air.

Q. If you stop them now—I mean an appreciable period of time elapses, will they still start up without any cranking or without—how do you start them up in the morning, in other words?

A. Well, if they are cold you have to use heat.

Q. But if the engine is moving along, if the boat is moving along, you can stop the engine, and if you didn't push the other levers ahead it would be absolutely dead; is that correct?

A. That is correct. Then you move the other levers and it immediately starts up.

Q. And it is warm; is that correct?

A. You have two levers which are your starters and throttles, and you have two levers to shift your engines.

Q. I am not sure I still understand, but, at any rate, on this particular occasion you merely pushed

(Testimony of Richard Sadewasser.)

two levers forward and pulled two levers back and that, and in that interval your power which had been driving your boat ahead was reversed and was pushing your boat backwards; is that correct?

A. No, sir, your cam levers on your outside of your throttle such as this, when you are going they are straight up, your engines are running, they are straight up, and the throttles are naturally further ahead. When you stop you pull your throttles back, your engine stops. Then you pull these two cams, levers back, and they are in reverse. Then you just shift your throttles [198] ahead again, she starts up, and they are in reverse.

Q. And that is what you did, as you described, when you saw this boom was not going to quite clear the bridge? A. Yes, sir.

Q. How high was the end of this boom above the level of the water? A. I don't know.

Q. Well, you were there, weren't you?

A. Yes, sir.

Q. You picked it up at Vancouver?

A. Yes, sir.

Q. You knew you were going to go under this bridge, didn't you? A. Yes, sir.

Q. Well, don't you have some idea of the height of the end of the boom above the level of the water?

A. No, sir.

Q. Do you know what the height of the water was on the day of this accident?

A. No, I don't know what the gage was. I know it was very high.

Q. What is that?

(Testimony of Richard Sadewasser.)

A. I know it was high.

Q. Well, you said that you were about 25 feet above the water, didn't you? A. Yes, sir.

Q. How far was the end of the boom above the level of your eyes? [199] A. I don't know.

Q. How high was the end of the boom?

A. I don't know.

Q. You say there were three other men on the tug, on the tug someplace? A. That's right.

Q. Would it have been possible for one of those men to be out at a better point of advantage to see the relationship between this boom and the bridge as you came up to the bridge A. No, sir.

Q. You said that the gravel barge was in front of the tug, didn't you? A. Yes, sir.

Q. And the other barge extended even further than that; is that right? A. Yes, sir.

Q. Nobody was on either the gravel barge or the crane barge? A. No, sir.

Q. What, if anything, was on the end of this boom? A. Would you repeat that?

Q. What, if anything, was on the upper end of this boom?

A. Well, there was a large sheave in the end of the boom itself.

Q. Did it hang down vertically?

A. No, sir, it was——

Q. Was it lashed to the boom? [200]

A. It is on the boom itself. It is where your line comes from the winches over the end of the boom. There is a block hanging down at the end of the line, yes.

(Testimony of Richard Sadewasser.)

Q. Well, how low did it extend below the end of the boom?

A. Well, it was down to the deck of the barge.

Q. Well, I thought—wasn't there a block there at the very upper end of the boom?

A. No, sir, the block at the far end of the boom was hooked to the deck of the barge itself, and farther back from the far end there is another block which was hanging about half-way from the deck of the barge and the boom.

Q. Then it is your testimony that the upper end of the boom was free of any block or any equipment of any kind?

A. Just a large sheave in the end of the block, yes, sir.

Q. What do you mean by that?

A. It's a large wheel.

Q. Reel? A. Wheel.

Q. Wheel?

A. Yes, that your line runs over.

Q. And was it right at the end of the, the center of this wheel was right in the center of the boom?

A. Molded right into the center of the end of the boom, yes, sir.

Q. Was that knocked off in this accident?

A. No, sir. [201]

Q. They said something about a big block or pulley being dropped off on the bridge.

A. That was the one that was hanging down from about half-way to the deck of the barge.

Q. When this boom contacted the bridge you

(Testimony of Richard Sadewasser.)

said that there was about, about what point was the contact made; how near to the upper end of the boom? A. It was on the end of the boom.

Q. The extreme upper end of the boom?

A. Yes, sir, the wheel went through the guard-railing, rolled through the guard-rail, the sheave on the end of the boom.

Q. And above the deck of the——

A. Bridge.

Q. The liftspan? A. Yes, sir.

Q. Then it went clear through to the other side of the bridge, didn't it? A. Yes, sir.

Q. When you say the impact was not severe it did carry it through, this angle of your boom rode up onto the deck of the bridge, didn't it?

A. Yes, sir.

Q. Were you actually watching the end of this boom as you came up to the bridge to see whether it was going to clear or not?

A. I was watching the end of the boom to see the two piers of [202] the bridge.

Q. How wide was your tug and tow?

A. About 80 feet.

Q. Eighty feet over-all width?

A. Yes, sir.

Q. You had quite a lot of clearance on each side then, didn't you? A. Yes, sir.

Q. And as you came up to the bridge there did you change your course as to going north or south from what you had been moving as you came up to this place where you said you stopped your engines?

(Testimony of Richard Sadewasser.)

A. No, sir.

Q. In other words, you were, you were trying to operate right in the thread of the stream, weren't you? A. Yes, sir.

Q. You were aiming for about the middle of this drawspan, weren't you? A. Yes, sir.

Q. You came straight out there as best you could from the time that you—at least from this quarter of a mile back? A. Yes, sir.

Q. Could you give us the minimum speed you reached when you had your engines shut off there?

A. I would say one-half mile. [203]

Q. Then you decreased from four to one-half, and then built up to a mile and a half, approximately? A. Yes, sir.

Mr. Lister: I believe that's all.

Redirect Examination

By Mr. Wood:

Q. I think it is fairly obvious from his testimony, but I would like to ask him, your view was unobstructed? You could see the bridge, the top of the boom and everything ahead of you, couldn't you? A. Yes, sir.

Q. You said you had been through there two or three times before this and you had never heard any whistle from the bridge signaling you to come on. I just wanted the Court to understand that you have been through that bridge though many, many more times than that, haven't you?

A. Oh, yes, sir.

(Testimony of Richard Sadewasser.)

Q. Well, explain that.

The Court: Oh, I know he goes through there constantly without the draw being lifted.

The Witness: Yes.

Mr. Wood: That's right, that's all.

(Witness excused.)

Mr. Wood: I will call Mr. Benson just for a short question. He is one of their witnesses. [204]

The Court: Mr. Benson, will you resume the witness stand?

HAROLD BENSON

recalled, testified as follows:

Examination

By Mr. Wood:

Q. Mr. Benson, was this whistle on the bridge, the one that failed to operate because of power failure, has that got any air compressor tank attached to it, or does it work directly from an electrical push button?

A. It works directly from electrical push button.

Q. There is no air compressor there, is there?

A. Not that I know of.

Q. Nor no air tank with compressed air?

A. No storage tank that I know of.

Mr. Wood: That's all.

Examination

By Mr. Lister:

Q. While you are on the witness stand could I

(Testimony of Harold Benson.)

ask some questions. Did you make electrical repairs to this light out in the middle of the bridge?

Mr. Wood: Wait a minute, just a moment, is this cross-examination?

Mr. Lister: No, it isn't.

The Court: Well, bring it in on your case in rebuttal.

Mr. Lister: All right, your Honor.

The Court: If you want to ask him anything about the whistle it is all right.

Q. (By Mr. Lister): Is that the same whistle that has been on [205] there? How long has that whistle been on there?

A. Ever since the bridge was built, as far as I know of, or at least it has been on there ever since I started doing any work on the bridge.

Q. Well, it wouldn't be there until—did you work on the bridge before the liftspan was put on there? A. No, I did not.

Q. Is this the same whistle that has been on there ever since the liftspan was put in, so far as you know? A. As far as I know, it is.

Mr. Lister: I think that's all.

The Court: We will now recess until two o'clock.

(Thereupon, at 12:00 o'clock noon, the trial was recessed until 2:00 p.m., same day.) [206]

Afternoon Session

(2:00 o'clock p.m., trial resumed.)

The Court: Call your next witness.

Mr. Wood: Call Captain Russell.

JAMES M. RUSSELL

called as a witness in behalf of the respondent, Tug Lew Russell, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Wood:

Q. Mr. Russell, where do you live?

A. I live in Portland, sir, on Northeast Marine Drive.

Q. You are one of the Russell family that owns and operates the Russell Towboat and Moorage Company, are you? A. Yes, sir.

Q. How long have you been working on the waterfront and on the river?

A. Approximately 15 years, sir.

Q. Do you hold a pilot's license?

A. Yes, sir, I am a First Class Pilot.

Q. Is that for both steam and diesel?

A. Yes, for 500 gross ton.

Q. Who was Captain of the Tug Lew Russell on the occasion of this collision with the Hood River-White Salmon Bridge?

A. I was, sir. [207]

Q. Were you on watch at the time?

A. No, sir.

(Testimony of James M. Russell.)

Q. When were you about to come on watch?

A. I was due on watch at twelve o'clock.

Q. Preparatory to coming on watch were you called by anybody to come on?

A. Yes, sir, about eleven, about——

Q. About how long before noon were you called?

A. About 11:40, sir.

Q. What did you do then?

A. I put on my clothes, came out on deck, sir.

Q. Were you anywhere near the pilothouse?

A. Yes, sir, I was standing directly below it.

Q. Where was your boat with reference to the bridge at that time? A. I beg your pardon?

Q. Where was the Tug Lew Russell with reference to the bridge when you came out on deck?

A. It was approaching the bridge, sir.

Q. It was approaching the bridge?

A. Yes, sir.

Q. Had it already come to a stop and then resumed its forward motion?

A. What do you mean? I don't follow you, sir.

Q. Well, Mr. Sadewasser testified that a quarter of a mile below [208] the bridge he came to a stop, then the bridge lifted, and then he resumed his forward motion.

Mr. Lister: I don't think that was his testimony, Mr. Wood.

The Court: It would not make any difference. It is a leading question to this witness.

Mr. Wood: I am only trying to identify.

The Court: Yes, go ahead.

(Testimony of James M. Russell.)

Q. (By Mr. Wood): When you came on deck the first time had your tug stopped its engines below the bridge and then resumed its motion, or had it not?

A. Yes, sir, what woke me up just prior to the man calling me was the fact that the engines had stopped.

Q. That's what I wanted to find out. So when you came on deck your flotilla had already resumed its motion forward, had it? A. Yes, sir.

Q. Any idea how far you were below the bridge when you first saw it? A. Not exactly, sir.

Q. Did you see the draw lifted?

A. Yes, sir, I saw that it was open.

Q. It was already open? A. Yes, sir.

Q. Was it still raising, or had it risen and come to a stop?

A. It was standing still, but it was open.

Q. Was there ever any doubt in your mind but what you would [209] clear it?

A. No, sir, not at any time.

Q. Will you say something to the Court explaining how easy or how difficult it is for a man low on the water to judge exactly the height of a span ahead of him?

A. Yes, sir, it is very difficult for any person in a powerhouse with a clear vision with a tow which is in front of a person sticking out in front of you 200 feet to tell exactly how high that boom is or whether it is going to clear her or not. That is left up to the bridge tender to take care of.

(Testimony of James M. Russell.)

Q. Why is it difficult for you to tell?

A. Because you are so far away that you cannot tell whether you are high enough or low enough to go under the bridge.

Q. So that a person being low on the water with reference to the span being a danger, does that have something to do with it or not?

A. Yes, it does. If you are at the same level with the bridge you could see it, but since you are so far below you cannot tell.

Q. At any time prior to the crash did you see the bridge tender?

A. No, sir, I never did see him until he came out on the span after the crash.

Q. Did you ever receive any signals from the bridge one way or the other?

A. I never saw him so I can't say, sir.

Q. I mean were any whistles blown from the bridge? [210]

A. No, sir, at no time.

Q. Have you been up those waters and under or through the bridge many times?

A. Many times, sir. I had to have at least 50 trips before I could get my license, and I had to have that in a two-year period.

Q. Have you been through there with a tow that necessitated raising the draw?

A. Yes, sir, twice.

Q. Only twice?

A. Yes, sir.

Q. On either of those occasions was any whistle blown from the bridge, any blasts or anything else?

(Testimony of James M. Russell.)

A. No, sir.

Q. Inviting you to come on?

A. No, sir, at no time.

Mr. Wood: That's all.

Cross-Examination

By Mr. White:

Q. If I may ask a question, Captain. Just before the vessel or tug and barge hit the bridge or before the boom hit the bridge, in other words, when your vessel and tug was imminently upon the bridge, where were you standing?

A. I was standing on the portside which is the left side just directly below the pilothouse, which is approximately eight or [211] nine feet below the pilothouse.

Q. What deck do you call that?

A. That's the "Texas" deck.

Q. That's the one deck above the main deck?

A. Yes, sir.

Q. And then the pilothouse is just directly above the "Texas" deck? A. Yes, sir.

Q. Were you looking at any particular part of the bridge or facing any part?

A. Yes, sir, I was looking at the port side of the bridge, from the port. I was looking at the north shore side or Washington side of the bridge on which the pier rises along the side I could see from that angle.

Q. Were you in a position to have seen any kind of a signal if one was given?

(Testimony of James M. Russell.)

A. Yes, sir, I was.

Q. You didn't see any?

A. I was in a position to see only a signal from that side of the bridge. I could not see the crane from where I was standing.

Q. When the engines stop or the engines are shifted in the pilothouse is there any noise or any indication you could hear from where you were standing?

A. Yes, sir, you hear a terrific blast of air, and also you hear the exhaust suddenly quit. [212]

Q. Now, just before the crash did you hear anything like that?

A. Yes, sir, I did. That made me suspicious the minute I heard the engines stop and start in reverse again, start up in reverse.

Q. That was just an instant before the crash?

A. Yes, sir, I realized he was reversing his engines at that time.

Q. I believe that's all. Oh, by the way, Captain, you have been on the river for about how many years?

A. For approximately 15 years.

Q. Fifteen years, and have you in the course of your duties had occasion to estimate speed of tugs and barges of various sizes and descriptions?

A. Yes, sir, I have.

Q. From the time when you first stepped out on the deck, which I understand was as your tug was making the approach, did you have occasion to be conscious of the speed of your tug?

A. Yes, sir, I noticed that the engines were

(Testimony of James M. Russell.)

idling. They were not running their regular speed, because of the exhaust noise.

Q. What do you estimate was the speed of your tug as it was approaching the bridge?

A. Approximately a mile and a half an hour.

Mr. White: That's all.

The Witness: That is land miles.

Mr. White: Land miles?

The Witness: Yes, sir. [213]

Mr. White: I believe that's all.

Cross-Examination

By Mr. Lister:

Q. When you say land miles you mean it was going over the ground about a mile and a half an hour; is that what you mean?

A. Traveling on the water. Traveling on the water at the speed you would approximately on land.

Q. Well, you were going against the current, weren't you? A. Yes, sir.

Q. And as I understood your answer to this question, you were making a mile and a half over the ground, mile and a half an hour; is that right?

A. Against the current, yes, sir.

Q. Would you have any idea what the current was there?

A. I would say approximately five miles an hour since the water was high at that time.

Q. As a matter of fact, the water was quite high, wasn't it? A. I don't know how high it was.

(Testimony of James M. Russell.)

Q. Were you the one that got the message, I mean that called and told the bridge you were coming through? A. No, sir.

Q. Who did that? A. The office.

Q. Do you know when they told them they were due? A. No, sir. [214]

Q. When did you expect to be there? When did you expect to be at the bridge?

A. When we got there.

Q. Well, is that what your office told the bridge tender? A. I don't know.

Mr. Wood: Objected to as immaterial, when they got to the bridge or what someone else told someone else. He was not there.

Q. (By Mr. Lister): Do you know who actually gave the bridge operator the information that the equipment was coming through and to have the bridge open? A. I do not.

Q. Well, who would have that information?

The Court: What difference would it make, Mr. Lister? There is no question that the bridge was ready for them at the time they arrived.

Mr. Lister: Here is what I would like to ask you. Mr. Adams testified that the information given him was to be there at eight-thirty. Did you contemplate when you started up the river you would be there at eight-thirty in the morning?

A. Nobody gave me any information about that.

Q. What is that?

A. Nobody told me about eight-thirty or any

(Testimony of James M. Russell.)

time at all. All I know is that they told me the bridge would be ready for me.

Mr. Wood: If your Honor please, the bridge lifted the draw, it was waiting for them. They got the notice. It doesn't make [215] any difference whether they were there early or late.

The Court: I can't see the materiality of that testimony at all.

Q. (By Mr. Lister): Did you make any stops between Vancouver and the bridge?

A. At Bonneville.

Q. How long did you stop there?

A. I don't know.

Q. How do you know, how did you know you stopped there?

A. Because we have to go through the locks.

Q. Is that the only reason you know you stopped there?

A. That's right, I happened to be on watch at the time.

Q. Well then, you would know how long you stopped, wouldn't you?

A. If you wish to know, sir, it is in my log book.

Q. What is your relation to the Russell Towboat and Moorage Company?

A. I am one of the two brothers.

Q. Well, are you a stockholder in the Company?

A. No, sir.

Q. Are you an officer of the Company?

A. No, sir.

(Testimony of James M. Russell.)

Q. What is your relation to the Russell Family, Incorporated?

A. I am a son of the family and a brother of my brother.

Q. Do you have interests—are you a stockholder in the Russell Family, Incorporated? [216]

Q. Who employes you; who do you work for?

A. Russell Towboat and Moorage Company.

Q. Were you working for Russell Towboat and Moorage Company on the day of this accident?

A. I was.

Q. How do you know you were?

A. Because they hired me.

Q. When you say they hired you, who actually hired you?

A. Russell Towboat and Moorage Company.

Q. Well, Russell Towboat and Moorage Company, as such couldn't hire you. Who actually hired you?

A. The management.

Q. Who was it, John Smith, Jim Russell, or who was it?

A. Russell Towboat and Moorage Company.

Q. Well, Mr. Russell, what individual hired you to work for the Russell Towboat and Moorage Company?

A. The management.

Q. Who is it? A. It would be my brother.

Q. What is his name? A. Lew Russell, Jr.

Q. How did you do any work for the Russell Family, Inc.?

A. I don't know.

Q. Who was on this equipment, the tug, on the day of the accident, other than you and Mr. Sade-wasser? [217]

A. Two deckhands.

(Testimony of James M. Russell.)

Q. Did you and Mr. Sadewasser alternate on piloting this equipment?

A. We stand six hour watches on the towboat.

Q. The deckhands didn't pilot the ship at any time?

A. Absolutely not.

Q. When you were on duty did one of the deckhands work with you, and when he was on duty did one of them work with him?

A. Yes, sir.

Q. They alternated the same as you and Sadewasser; is that correct?

A. Each man had a deckhand to work on the watch that he worked on.

Q. Where were these deckhands at the time this equipment was approaching the bridge?

A. I don't know.

Q. You say you have passed under this draw when it was raised on two occasions other than the one in question; is that correct?

A. Yes, sir.

Q. You say that on no other occasion did they sound a whistle?

A. No, sir, they never did.

Q. Did you see this red light in the middle of the drawspan?

A. No, sir.

Q. Did you ever see a red light in the middle of a drawspan?

A. At no time have I ever seen a red light in the middle of [218] the drawspan.

Q. Did you ever pass through the bridge at night?

A. Yes, sir.

Q. When the span was raised?

A. No, sir.

Q. The times you passed through the bridge with the span raised were in the daytime; is that correct?

(Testimony of James M. Russell.)

A. That's right, sir.

Q. Do you remember when those occasions were?

A. No, sir.

Q. Well, you are positive there are two times though?

A. Yes, sir, I remember one time. I will say that.

Q. When was that, please?

A. When the bridge hired General Construction Company to do something, pile driving work up there, to move their bridge span. I brought the equipment back down from General Construction Company, and they notified the bridge to open the span and they opened the span just far enough to hit the top of the pile driver.

Q. When was that?

A. You will have to check with General Construction Company.

Q. Well, with regard to June of 1950, would it be a month before that, two months, a year?

A. I don't know.

Q. Wouldn't you know whether it was 1950 or not?

A. No, sir, I don't know. [219]

Q. Where did you say the equipment was; from where did you get the equipment?

A. On the upstream side of the bridge, the Oregon shore.

Q. You took it through the bridge; the span was raised, and you bought it downstream from the bridge; is that your testimony?

A. I took it back to Portland at that time, and the bridge was not high enough though it missed

(Testimony of James M. Russell.)

about two inches, and the roller on top of the pile driver rolled underneath the bottom of the bridge. Your Honor, do you mind if I stand up? I get sort of dizzy here.

The Court: All right, go ahead.

Q. (By Mr. Lister): You couldn't give us any idea of any other time it was that you went through there when the span was raised? A. No, sir.

Q. Nor what kind of equipment you had?

A. No, I don't remember.

Q. I suppose you agree with Mr. Sadewasser?

The Court: Don't you feel well?

The Witness: I feel all right, sir, I just feel sort of a little dizzy. I don't know what from.

The Court: Let's take a recess.

The Witness: That's all right, I will answer the questions, your Honor.

Mr. Wood: I think he can finish all right. [220]

The Witness: I will finish all right. I just like to lean against something.

The Court: All right, go ahead.

Q. (By Mr. Lister): Do you have any mechanical equipment on the tug to register speed? Is there any, like compared with a speedometer on the automobile?

A. Yes, sir, we have tachometers on the towboat.

Q. Where is that located?

A. In the pilothouse.

Q. You would not be in a position to see that?

A. Not while I was off duty, no.

Q. From where you say you stood, as I under-

(Testimony of James M. Russell.)

stand it, you were still lower, nearer the water than the pilot would be; is that correct?

A. That's right.

Q. You are farther to the stern and to port; is that correct? A. I beg your pardon?

Q. I understood you to say you were to the port and farther aft from where the pilot was standing?

A. I was about three feet back from the front of the boat.

Q. How many? A. About three feet.

Q. About three feet? A. Yes, sir.

Q. Well then, would you be farther ahead than the pilot was? [221] A. No, sir.

Q. As you stood there would the gravel barge be right in front of you? A. Yes, sir, part of it.

Q. Sir? A. Just part of it, all I could see.

Q. Was the gravel barge loaded with gravel?

A. I don't remember, sir.

Q. You don't remember whether you had any load on the gravel barge at all?

A. It was drawing six feet of water, if that's what you mean.

Q. How do you know that?

A. Because it was loaded before.

Q. I thought you said you didn't remember?

A. I said I didn't remember whether it had gravel on it or what it had on it.

Q. Oh. Well, how much freeboard would it have, drawing six foot of water?

A. About four or five inches.

Mr. Lister: I think that's all.

(Testimony of James M. Russell.)

Cross-Examination

By Mr. White:

Q. I had one question to ask. I wanted to show you Exhibit 1, Captain. Take a look at that picture, will you, please. That shows how the crane was secured to the deck of the LSM; does [222] it not?

A. Yes, sir, both on the boom and on the base of it.

Q. That's right. Now when you have commanded a tug do you have any responsibility of observing the seaworthy stowage or trim of anything you take into it?

A. Yes, sir, that's the first thing you are supposed to observe is whether your tow is fit to be pushed up the river, and especially in fast water.

Q. Now you have had about 15 years experience towing different objects and crafts, have you?

A. That and being on the deck, sir.

Q. You are licensed to navigate the river?

A. Yes, sir, from Portland to Celilo.

Q. In your opinion, was that crane barge as placed on the LSM stowed and secured in a seaworthy and proper manner?

A. Yes, sir, it was.

Mr. White: That's all.

Recross-Examination

By Mr. Lister:

Q. Did you put it on there, Mr. Russell?

A. No, sir.

(Testimony of James M. Russell.)

Q. What did you do in the way of examining it to see if it was properly stowed?

A. Just checked to see that the deck was level, there wasn't any water around, down by the stern, and also to see that the boom [223] was anchored properly so if we did hit a windstorm up above it wouldn't turn it around.

Q. Why wouldn't it be just as practicable to turn the boom around the other way and have it downstream rather than upstream?

A. That I couldn't answer, sir.

Q. As far as you know, it would be just as well to haul one way as the other?

A. No, sir, it would not be seamanship to put it on the stern.

Q. Why wouldn't it?

A. Did you ever see a crane going down the river with the boom hanging out over the stern of it?

Q. Can you tell me why it would not be equally seaworthy if the boom had been fixed in a downstream position rather than upstream position?

A. Yes, I can, behind me, to go into the locks the boom would have been hanging on the back and hit the side of the locks with that crane barge and swing the crane around, probably hit the boat, bend it or some other way.

Q. Why would it do it more to the rear, aft, instead of sitting forward?

A. I beg your pardon?

Q. Why would it do that more if it were aft than it would as the way it was forward?

(Testimony of James M. Russell.)

A. There would be no way to secure the boom.

Q. What is that? [224]

A. There would be no way to secure the boom.

Q. How did you secure it in the forward position?

A. With a cable hooked onto the end of the block as you can see in the picture. There is a cable runs down the end of the boom, and it was anchored to the deck of the crane barge so it wouldn't swing.

Q. Was that boom permanently anchored to a, to the deck of the barge?

A. I don't follow you there.

Q. Was the bottom end of that boom permanently secured to the deck of the barge?

A. If you mean the power unit part of it?

Q. Well, there is that long shaft that sticks up. That's what you call the boom, isn't it?

A. Yes.

Q. Was the lower end of that permanently attached to the deck of the barge?

A. The lower end, yes, the lower end was but not—the higher end was not.

Q. As I understand, you say it was, this anchor point was back of the middle of the crane barge; is that correct?

A. No, I did not say, I think the anchor point was off the boom, off the end of the boom, straight to the deck.

Q. Well, if the bottom of the boom was aft or forward of the center, why couldn't you have anchored it to the rear as well [225] as ahead?

(Testimony of James M. Russell.)

A. Because the crane does not sit that way on the barge. It sits on the back end of the barge. It doesn't sit on the middle of it.

Q. That is just what I asked you.

A. I didn't understand your question there.

Mr. Lister: That's all.

The Court: That's all.

(Witness excused.)

The Court: Call your next witness.

Mr. Wood: Call Captain Lew Russell, Jr. [226]

LEW RUSSELL, JR.

called as a witness by the respondent Tug Lew Russell, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Wood:

Q. What is your name?

A. Captain Lew Russell.

Q. You live in Portland, do you?

A. I live in Washington County. My address is 6622 Southwest Mayo Street, Portland, Oregon.

Q. Are you an officer of the Russell Family, Inc.?

A. Yes, sir, I am the secretary of the Russell Family, Inc., and the manager.

Q. And are you also affiliated with Russell Tow-boat and Moorage Company?

(Testimony of Lew Russell, Jr.)

A. Yes, sir, I am the President of the Russell Towboat and Moorage Company and also manager of that Company.

Q. Now do you hold stock in the Russell Family, Inc.?

A. Yes, sir.

Q. Now would you just explain to the Court the different purposes or the different businesses that Russell Family, Inc., is in, and Russell Towboat and Moorage?

A. Yes, sir, Russell Towboat and Moorage Company is an operating Towboat Company on the Willamette and Columbia Rivers, and [227] Russell Family, Inc., rents equipment to Russell Towboat and to other carriers.

Q. Now Crane Barge 25 referred to in the subject of this litigation, who owned Crane Barge 25?

A. That belonged to Russell Family, Inc.

Q. And that is an LSM type steel hull vessel?

A. Yes, sir.

Q. About how long?

A. Approximately 200 feet long.

Q. About what is the beam?

A. Approximately four feet beam.

Q. And is there any propelling machinery in that?

A. No, sir.

Q. That is a barge?

A. Yes, sir.

Q. On top of the deck of the barge is this crane secured to the barge?

A. Yes, sir, the crane base is welded firmly to the steel deck of the barge and then a crane is set on the base and bolted to it.

(Testimony of Lew Russell, Jr.)

Q. On this trip up the river—I am speaking of June 13, 1950, where we had this accident in which there is this discussion—was there another craft on top of, on the deck as cargo on the Crane Barge 25?

A. Yes, sir, a small landing craft, steel.

Q. A steel landing craft, and how big was [228] that?

A. That was approximately 55 feet by 14 feet beam, six foot deep, and weighing a little over 22 tons.

Q. Now did Russell Family, Inc., charter the LSM Crane Barge 25 to the McNary Dam contractors?

A. Yes, sir, I did that.

Q. Did they also charter the LCM, the small craft on top?

A. Yes, sir.

Q. Was that in the same charter, same arrangements?

A. Yes, sir, they went together in the same arrangements.

Q. What was the purpose, what was the intended use for this craft, if you know?

A. The crane was to be used to build McNary Dam, and which it did very successfully, handled all of the problems on the water, and the small landing craft used to haul the crews to the crane while it was in operation on that dam.

Q. The small craft that was on the deck at the time was more or less a tender to the LSM; is that right?

A. Yes, sir.

Q. Did that small craft have a self-propelling engine in it?

(Testimony of Lew Russell, Jr.)

A. Yes, it had two Gray Marine engines, 165 horsepower a piece.

Q. How much did that small craft weight?

A. A little over 22 tons.

Q. How did you put that craft on top of the deck of the LSM?

A. I ran the crane barge myself and had some slings pick it up and set it on the tug. [229]

Q. In other words, this crane barge that was damaged in this accident, that was the equipment that put the Laura Louise, which is the LCM, aboard the LSM; is that correct? A. Yes, sir.

(Document, statement of actual repairs to LSM Crane Barge 25, marked Respondent's 3 for identification.)

Q. (By Mr. Wood): I show you, Mr. Russell, this marked Respondent's next in order for identification. As a result of this collision with the Hood River-White Salmon Bridge, Mr. Russell, the Crane Barge 25 was damaged; is that right?

A. Yes, sir.

Q. What was the character of the damage? Do you recall?

A. Yes, sir, the boom was bent and sprung very badly. It would be dangerous to make any lifts with the crane.

Q. How about bolts, were there any deck plating ripped out or anything?

A. Well, yes, the boom section itself, the angle irons were broken and bent, rivets sprung and it necessitated quite a repair job.

(Testimony of Lew Russell, Jr.)

Q. The LCI was called, referred to as the Laura Louise, wasn't it?

A. Yes, I believe that's an LCM.

Q. LCM.

A. LCM under the name of Laura Louise. [230]

Q. The LCM and the crane barge were under charter at the time they left the moorage at Vancouver?

A. Yes, sir.

Q. And they were proceeding up the river?

A. Yes, sir.

Q. They were chartered to McNary Dam General Contractors?

A. That is correct, sir.

Q. Now after this collision who repaired the damage to the LCM?

A. The McNary Dam Contractors repaired the damage.

Q. Did they deduct it from money due you?

A. Yes, sir.

Q. And this Respondent's Exhibit 3 for identification, is that the detailed statement of the actual cost of repair of the LSM, the Crane Barge 25, that you received from them?

A. Yes, sir.

Q. I notice at the bottom of it they also deducted as part, as an item of expense from Russell Family, Inc., the rental. It says, "Rental on barge 6/12/50 through 6/30/50, rental due for two days only." What does that mean?

A. Well, the barge was out of commission due to the damage of the crane so that they could not use it in their work so they deducted from their payments that rental.

(Testimony of Lew Russell, Jr.)

Q. In other words, for the 30 days from the time it left the moorage they only had two days' use; is that it? [231] A. Yes, sir.

Q. So they deducted the 28 days?

A. That's right.

Q. I see. Also right below there, "Rental on tug 6/12/50 through 6/30/50, rental due, two days only." What does that represent?

A. Well, they also did not pay me for the use of the towboat because they were unable to use it because of the crane being out of commission.

Q. By "towboat" what craft are you referring to?

A. The Laura Louise, the little boat that was on the deck.

Mr. Wood: I might say, your Honor, Mr. Lister to facilitate matters talked on the telephone with an officer or a person of the McNary Dam Contractors in reference to determining in his own mind whether these expenses and items were necessary and related to the action; is that right?

Mr. Lister: That is correct, your Honor, and I told Mr. White that I would stipulate if that gentleman were here he would testify that these prices were charged and were fair and reasonable for the services rendered.

Mr. Wood: And related to this accident?

Mr. Lister: Well, I don't—Mr. Russell has testified to that. He would say they were caused by some violence. I think that's as far as we can go, Mr. White.

(Testimony of Lew Russell, Jr.)

Q. (By Mr. Wood): Well, I will ask Mr. Russell, are all of these [232] expenses and items as set forth in Respondent's Exhibit 3 for identification necessary to restore Crane Barge 25 in the condition it was before its collision with the Hood River Bridge? A. Yes, sir.

Q. And these are all related to this accident?

A. Yes, sir.

Mr. Wood: I believe that's all.

The Court: Do you want to introduce, to offer that?

Mr. Wood: Yes, I offer that in evidence as Respondent's Exhibit 3.

The Court: It will be admitted.

(Thereupon, the document previously marked Respondent's 3 for identification was received in evidence as Respondent's Exhibit 3.)

The Court: It has been admitted, there being no objection.

Q. (By Mr. Wood): This shows that the total amount, Mr. Russell, that was taken from Russell Family because of this collision was \$3,306.11; is that correct? A. Yes, sir.

Q. And that is what Russell Family, Inc., is asking in this cross reply against the bridge?

A. Yes, sir.

Q. That's all.

(Testimony of Lew Russell, Jr.)

Cross-Examination

By Mr. Lister:

Q. I didn't understand just exactly the relationship of the Russell Towboat and Moorage Company, Mr. Russell.

A. I run Russell Towboat and Moorage Company.

Q. Did you say you were President?

A. President and manager.

Q. You are the secretary and manager of Russell Family, Inc.? A. Yes, sir.

Q. When you make a deal, do you sign a contract for both concerns?

A. I do all the dealing for both companies, yes, sir.

Q. Did you have any writing between Russell Family, Inc., and Russell Towboat and Moorage Company in regard to this particular transaction?

A. Which transaction are you referring to?

Q. The transaction involving the taking of this equipment up to the McNary Dam, delivering it to the contractors up there?

A. It is not customary to have a written contract on moves of a barge on the river here, sir. We have a filed tariff to take care of that.

Q. What is that, please?

A. We have a filed tariff.

Q. A filed tariff?

A. Yes, that's why it is not necessary to have a written contract to take care of such a move.

(Testimony of Lew Russell, Jr.)

Q. Are all of the men on the Lew Russell, Sr., wasn't that the name of the tug? [234]

A. Yes, sir.

Q. Are they employes of Russell Towboat and Moorage Company? A. Yes, sir.

Q. Paid by Russell Towboat and Moorage Company? A. Yes, sir.

Q. How long would it take the tug to tow this equipment to McNary Dam? When did you expect to have it there, Mr. Russell?

A. It would depend on the interchange at Celilo. That is a variable factor. This tug would only take the equipment to Celilo, and another tug would take it from Celilo on up.

Q. How did you get up through the—what about at Bonneville? You didn't have to make any change there? A. No.

Q. Do you yourself operate as a Captain on the river still?

A. Yes, sir, I have a Master's license for a thousand ton, steam and diesel, from Celilo to the Ross Island Bridge and from Astoria to the Megler Ferry Crossing, have had that for seven years.

Q. Do you still work on the river?

A. Yes, sir, I do all the fast water for Tidewater and Russell Towboat and Moorage.

Q. What did you say the beam on the Crane Barge 25 was? A. Approximately 34 feet.

Q. 34, 200 feet long? A. Yes, sir.

Q. Where was the base of this boom located with regard to fore [235] and aft on this crane barge?

(Testimony of Lew Russell, Jr.)

A. The boom is fastened into—the base of the boom is fastened into the cab of the crane.

Q. Well, if it is 200 feet long, where would this, where would the base of the boom be located with regard to the fore and aft on the ship, on the barge?

A. The base of the boom is fastened by two pins into the crane base.

Q. It, in turn, where is it located on the crane barge?

A. The way that this—I happened to see one of those pictures, and then I also made up this tow myself, and the base of the boom is aft on this particular crane.

Q. How far aft is the center line?

A. I would say about half-way—maybe a little—about half-way between the center and stern.

Q. Is the base of that adjustable? Can you move it back and forth along the deck of the barge?

A. Are you referring to the base of the crane or the base of the boom?

Q. Well, how do you distinguished between the crane and the boom? I thought they were the same thing.

A. The boom is the long steel object that can be raised and lowered.

Q. Yes.

A. The crane base is the base that is square, and that whole [236] crane sits on that.

Q. And if you move that base you would move the bottom of the boom automatically, wouldn't you?

A. If it were possible, but it is not possible.

(Testimony of Lew Russell, Jr.)

Q. That's what I am getting at. Is the base fixed stationary so that it did not move about on the barge?

A. That boom base swings with the main crane, but the crane base is welded solid to the barge.

Q. I don't think there is anything else, I think that is all.

Redirect Examination

By Mr. Wood:

Q. I suppose you have passed under that bridge many times with tugs and tows, have you not?

A. Yes, sir, I have made many hundreds of trips underneath the bridge.

Q. Most of the times they didn't have to lift the draw, did they? A. Very rarely.

Q. Have you gone up there when they have lifted the draw?

A. In the last four years, approximately three times I have handled dredges, pile drivers and——

Q. Did they ever give you two blows of the whistle or any whistle signaling it was all right for you to come on?

A. I have never heard a whistle from that bridge in my time.

Q. That's all. [237]

Recross-Examination

By Mr. Lister:

Q. Captain, those three times, would that be prior to June 13, 1950? A. Yes, sir.

(Testimony of Lew Russell, Jr.)

Q. Have you been under there since June 13, 1950?

A. I have been under there, but I have not had to open the bridge.

Q. That's what I meant, you have not been through when they have had to raise or lower the span since June 13, 1950?

A. That's right.

Q. Prior to that you were under there, you estimate, three times when they had to raise the draw?

A. Yes, sir.

Q. Well, can you identify any of those times?

A. I couldn't give you the exact times. I would have to do some research on that, but I brought a large suction dredge for General Construction Company from The Dalles down to there. We had to open it to that. I have also brought pile drivers down there for General Construction Company. I don't recall, I would say around in the last four years about three times. We very rarely use that bridge excepting for large equipment.

Q. Were those passages always made in the day-time?

A. Yes, sir.

Q. Did you ever notice a red light in the middle of this liftspan? [238]

A. I have never noticed a red light in the day-time, sir.

Q. You can see traffic lights on the street all right, can't you?

A. From 25 feet away, yes, sir.

Q. Is that as far as you can see them?

(Testimony of Lew Russell, Jr.)

A. I probably can see them farther than you can, sir.

Q. You are sure that at no time have they given you a whistle signal or any signal to come through when that bridge span has been raised?

A. They have maybe blown a whistle, but I have never heard a whistle from that bridge, and I have excellent ears.

Q. That's all.

Mr. Wood: No further questions.

Mr. White: No question.

The Court: That's all, the witness is excused.

(Witness excused.)

Mr. Wood: I would like to offer in evidence the Regulations of the United States Army Engineers that have been referred to on the stand that went into effect after the accident.

The Court: Any objection?

Mr. Lister: Well, if your Honor please, I don't think it would be binding on anybody or I don't see how it would have any particular significance in the issues in this case.

The Court: Neither do I, but I thought if you just wanted to object, if you object to them, they won't go in. [239]

Mr. Wood: I think they are clearly admissible on two grounds, your Honor, which I will be glad to explain.

The Court: If they are, I would like to know the grounds upon which they are admissible.

Mr. Wood: Yes, they are admissible, in the first place, on the ground that these gentlemen claim that that red light should have been of some effect on us even during the daytime. These Regulations which the Corps of Engineers and which Mr. Chandler himself says he suggested do not suggest a red light or anything like that for the daytime.

The Court: I am not interested in the red light.

Mr. Wood: They suggest a green flag and a green light at night, and the other purpose of introducing this is to show that even now, even now there is no requirement in the Regulations that the bridge shall give a two-blast signal to the boat telling them to come on. They are not in the old Regulations, and they are not in the new Regulations.

The Court: The objection is sustained.

Mr. Wood: Well, I'd like to have them marked anyhow.

The Court: It may be marked.

(Document, Regulations of U. S. Corps of Engineers, marked Respondent's 4 for identification.)

The Court: I am going to change my ruling on that. I am going to take it under advisement instead of rejecting it at this time. I want to check some law. [240]

(Thereupon, the document previously marked Respondent's 4 for identification was received in evidence Respondent's Exhibit No. 4, the Court taking the same under advisement.)

Mr. White: Your Honor, I might say that I wish to withdraw my motion for a non-suit. I don't want to complicate any question of that having an effect on my cross reply.

The Court: All right, it may be withdrawn.

Mr. White: That is our case.

Mr. Wood: We have no further testimony.

The Court: Mr. Lister?

Mr. Lister: I want to call Mr. Benson. [241]

HAROLD BENSON

recalled on rebuttal, testified as follows:

Direct Examination

By Mr. Lister:

Q. You are Mr. Harold Benson who has already been sworn and testified in this case? A. Yes.

Q. Will you state whether or not, so far as you know, there has been any raising of this draw span since you commenced working for this bridge when you were not present? A. Yes, there has.

Q. How many—what I am getting at, what period were you there, and what period weren't you there, if that will answer the question?

The Court: Well, we will just assume he was there most of the time. He testified previously that on several occasions he was out of town, and, therefore, he was not there at the time it was raised.

Q. (By Mr. Lister): Could you give us an idea how many times you have been there when the span has been raised, Mr. Benson?

(Testimony of Harold Benson.)

A. Well, I would say most of the time in the last three years.

Q. Will you state whether or not when that span is raised and is ready for equipment to come in, signal has been given, and if so, how?

Mr. Wood: Objected to because that's part of their case in [242] chief.

Mr. White: And it is leading.

The Court: I am going to let it in. Frankly, I am going to tell you I don't think it is going to make any difference unless the Regulations required that they blow the whistle, but I am going to let the testimony in.

The Witness: It has been the custom to blow a whistle to let a vessel know that the bridge is clear to go under.

Q. (By Mr. Lister): Have you ever been on the bridge when the span was raised and ready for a vessel to come through and they have not blown that whistle? A. Not when I was there.

Q. Did you do any work towards repairing that light in the center of the span after this accident of June 13, 1950? A. I did not.

Q. Well, would you know whether or not it has been repaired at any time since then?

A. The only repair——

The Court: If you want to open the inquiry I am going to let in all the Regulations because you have objected to it on the ground that nothing happened, apparently, any repairs——

Mr. Lister: Well, if your Honor please, here is

(Testimony of Harold Benson.)

my thought on this. There has been some difference of opinion as to whether that light was burning at the time.

The Court: The only positive evidence here was that the [243] light was burning up to the time the power failed. Now the people who have testified on behalf of the Respondents also didn't notice whether it was burning or not.

Mr. Lister: Then that is all.

Examination

By the Court:

Q. Mr. Benson, I want to ask you a question. Did you ever notify the Russell Towboat and Moorage Company that they should wait for a blast before they proceed to enter the span? A. No.

Q. Do you know if anyone else has ever done that?

A. Not that I know of. That's all I know, that it has been a custom, common practice.

Q. Do you know whether any other towboat company has been notified to wait for a blast by the bridge? A. Not that I know of.

Q. Well, while you were on the bridge and the spans were opened did the ships always respond with one or more blasts after the bridge had sounded its blast? A. I don't remember about that.

Q. Can you ever recall any of the ships sounding the horn, the whistle? A. Yes.

Q. Asking for permission to enter?

(Testimony of Harold Benson.)

A. Just merely sounding their whistle as it come up the river to go under. [244]

Q. But do you know whether that was before or after the span was lifted?

A. Oh, yes, before.

Q. Was there any regular practice with reference to what ships should do?

A. No regular practice in reference to the ship.

Q. The only custom, as far as the bridge is concerned, were two blasts that would be given to come ahead?

A. That's right.

Q. Sometimes the ships responded; sometimes they didn't?

A. That's right.

Mr. Wood: I don't think he ever said the ships responded to that. I don't think he ever said that. He said they blew sometimes to raise the draw. That's the only whistle they ever gave.

The Court: Is that correct, Mr. Benson?

The Witness: That's right, sometimes a boat would sound a whistle to go under the draw, but I couldn't say that they have in every case.

Q. Well, I wanted to know whether Mr. Wood's statement was correct or mine. Did the ship sound its whistle in response to the bridge's whistle, or before?

A. Usually before.

Q. Usually before, that's all.

Mr. Lister: That's all, thank you. [245]

OSCAR HERMAN ADAMS

recalled for rebuttal, testified as follows:

Direct Examination

By Mr. Lister:

Q. You are Mr. Adams who testified the other day, aren't you? A. Yes, sir.

Q. Mr. O. H. Adams. Now during the time you have been an attendant on this bridge has there ever been a time when you were present that, that when the bridge was in a position to let equipment through, it did not sound a signal?

The Court: Mr. Lister, you have brought that out in your direct examination.

Mr. Lister: Of this gentleman?

The Court: Mr. Adams has already testified to that.

Mr. Lister: This gentleman?

The Court: That's right. He said every time a ship went through he signaled twice before they proceeded.

Mr. Lister: Fine, thank you, that's all.

Examination

By the Court:

Q. Mr. Adams, I will ask you the same question I asked Mr. Benson. Did you ever notify the Russell Towboat and Moorage Company or any other towboat company not to proceed, to go through the span unless you gave them two blasts?

A. I never did.

Q. Is your testimony the same as Mr. Benson's

(Testimony of Oscar Herman Adams.)

that sometimes [246] the ship blew the whistle, and sometimes they didn't?

A. Most generally they always did blow their whistle, as a rule, too, when they wanted the bridge raised.

Q. And if it was raised, then they wouldn't blow it. You would just give them the two blasts?

A. Well, as a rule, we never had the bridge raised. We didn't even know to raise the bridge until they blowed their whistle. Of course, we was always called, but we couldn't tell whether that was the boat or that was the boat coming.

Q. Did you hear a whistle from the Lew Russell, Sr.?

A. No, there was no whistle blown. The wind was blowing right towards me up the river, and I would have undoubtedly have heard it.

The Court: That's all.

Q. (By Mr. Lister): Mr. Adams, in connection with the Court's question, what is the fact as to whether or not craft moving back and forth would wait until they got those two blasts before they came through the bridge?

A. As a rule they did, yes, sir.

Mr. Wood: That's part of his case in chief. I don't think he ought to go into that.

The Court: The objection is overruled.

Mr. Lister: That is all. [247]

(Testimony of Oscar Herman Adams.)

Cross-Examination

By Mr. Wood:

Q. I want to ask you a question now that it has been brought up. Mr. Adams, the only time you ever go out on the bridge at all preparatory to lifting the draw is when you have some 12 hours' notice that some craft is coming up the river that may want the draw lifted; is that right?

A. Yes, that's the only time we have occasion to go out on the bridge.

Q. Certainly, and most of the times craft go under there without your being there at all because they go right under the bridge?

A. That's right.

Q. It's only a rare instance that you lift the draw at all, isn't it?

A. Yes, when we are notified.

Q. When you are notified?

A. That's right.

Q. All right. Well, then, when a ship comes up the river, and you have been notified that a ship is coming up with a boom on it and you see that that's the ship there coming up with a boom on it and you raise the draw, you don't wait for that whistle to raise the draw, do you?

A. Well——

Q. You didn't this time, did you?

A. No, we didn't.

Q. Well, that's all there is to it. [248]

The Court: Any further questions?

(Testimony of Oscar Herman Adams.)

Q. (By Mr. Lister): Just a minute now. Mr. Wood gave the impression that you only appeared there when they were going to raise the draw. Is that—I thought you were——

The Court: I know there is testimony there that he used to take the tolls for the bridge. He was on the bridge all the time.

Mr. Lister: That's what I meant. Thank you.

(Witness excused.)

Mr. Lister: Your Honor, I think the Court told me that we offered Exhibit 17, and you didn't rule it was accepted.

The Court: Which one is 17?

Mr. Lister: Those Mr. Chandler identified as the additional repairs.

The Court: Exhibit 17, is there any objection to it? It's an item of \$23,710 testified to as by Mr. Chandler.

Mr. Wood: I object to it.

The Court: It may be received, Exhibit 17.

(Thereupon, the document previously marked Libelant's No. 17 was received in evidence as Libelant's Exhibit 17.)

Mr. Lister: That is our case, your Honor.

The Court: Do you want to admit the Government Regulations with reference to opening the bridges on the Willamette River?

Mr. Lister: I tried to get in touch with Mr. Buck at the noon hour. He was not there. They

told me the man who really [249] knew about that was ill, not in the office. I asked them if they would get me the record. They had not gotten it when I had to come back to Court.

The Court: Do you want to make a statement now or submit any authorities?

Mr. Lister: I would like to submit some authorities. I would rather have a little time to do it.

The Court: On what point, Mr. Lister?

Mr. Lister: Well, I have not had a chance to examine the authorities that Mr. Wood called your attention to here yesterday, and I would like to examine those, and, if necessary, submit some authorities that I feel might not be exactly consistent with the excerpts which Mr. Wood read yesterday.

(Thereupon there was discussion between Court and Counsel.)

The Court: Well, today is Friday. Mr. Lister can have until Monday, February 5th, and the Respondents will have until February 14th in which to answer Mr. Lister. Mr. Lister, you can have until February 20th within which to answer. We will now adjourn until ten o'clock tomorrow morning.

(Thereupon, the trial was recessed pending submission of briefs by respective [250] Counsel.

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

State of Oregon,
County of Multnomah—ss.

I, Gordon R. Griffiths, hereby certify that I was the official reporter pro tem in the above-entitled libelm in rem in Personam, heard before the Honorable Gus Solomon in the United States District Court, District of Oregon, at Portland, Oregon, on January 25th, 1951; that I reported in shorthand all proceedings had and testimony taken in the above-entitled matter, that thereafter my notes were reduced to typewriting under my direction; that the foregoing transcript consisting of Pages 1 to 250, both inclusive, constitutes a full, true and correct transcript of all proceedings had and testimony taken in the above-entitled matter, and of the whole thereof.

I further certify that I am not related to nor Counsel for nor employe of any of the parties to the above-entitled libelm in rem Personam.

Witness my hand at Portland, Oregon, this 25th day of July, 1951.

.....,

Official Reporter Pro Tem.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Libel in Rem and Personam, Libelant's Stipulation for Costs, Claims of Owners, Answer of Respondents and Claimants, Stipulation to Abide and Pay Decree, Order Permitting Attorney Erskine Wood to Withdraw, Stipulation re Russell Family, Inc., Order Allowing Russell Family to Intervene, Petition and Intervening Libel of Russell Family, Inc., Stipulation for Costs, Answer of Libelant, Cost Bill of Russell Family, Inc., Libelant's Exceptions and Objections to Findings and Conclusions, Findings of Fact and Conclusions of Law, Final Decree, Notice of Appeal by Libelant, Petition for Appeal, Order Allowing Appeal, Appellant's Assignment of Errors, Bond on Appeal, Order Approving Bond and Staying Execution, Order Extending Time to File Appeal, Order to Send Exhibits, Designation of Record, and Transcript of Docket Entries, constitute the record on appeal from a decree of said court in a cause therein numbered Civil 5749, in which Oregon-Washington Bridge Company is libelant and appellant, and the Russell Family, Inc., and the Russell Towboat and Moorage Company are respondents and appellees; that the said record has been pre-

pared by me in accordance with the said designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith duplicate transcript of testimony filed in this office in this cause, together with libelant's exhibits 1 to 17 inclusive, and respondent's exhibits 3 and 4.

I further certify that the fee of \$5.00 for filing notice of appeal has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 28th day of July, 1951.

[Seal] LOWELL MUNDORFF,
Clerk.

/s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 13051. United States Court of Appeals for the Ninth Circuit. Oregon-Washington Bridge Company, a Corporation, Appellant, vs. Tug "Lew Russell, Sr.," and Crane Barge No. 25, Russell Family, Inc., Russell Towboat and Moorage Company, Appellees. Apostles on Appeal. Appeal from the United States District Court for the District of Oregon.

Filed August 10, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

In Admiralty—Civil No. 13051

OREGON-WASHINGTON BRIDGE COMPANY,
Libelant,

vs.

TUG "LEW RUSSELL, SR.," and CRANE
BARGE No. 25, in Rem,

and

RUSSELL TOWBOAT AND MOORAGE COM-
PANY and RUSSELL FAMILY, INC., in
Personam,

Respondents.

RUSSELL TOWBOAT AND MOORAGE COM-
PANY, Claimant of the Tug "LEW RUS-
SELL, SR.,"

and

RUSSELL FAMILY, INC., Claimant of Crane
Barge No. 25.

RUSSELL FAMILY, INC.,

Intervening Libelant,

vs.

THE HOOD RIVER-WHITE SALMON
BRIDGE, Its Gear and Paraphernalia, in Rem,

and

OREGON-WASHINGTON BRIDGE COMPANY,
Owner and Operator of Said Bridge,
Respondent.

APPELLANT'S STATEMENT OF POINTS ON
APPEAL AND DESIGNATION OF REC-
ORD

1. Under the law and the evidence the trial court should have made findings of fact, conclusions of law and a decree granting to appellant the relief prayed for in its libel herein.

2. The trial court erred in failing and refusing to sustain libelant's exceptions and objections to the findings of fact, conclusions of law and decree made and entered in the District Court in this cause on or about the 5th day of March, 1951.

3. The trial court erred in failing and refusing to find under the evidence submitted that respondents were negligent as alleged in libelant's libel and in failing and refusing to find that the collision and resulting damages were caused by the failure of the tug and its operators to maintain a proper or any lookout; in proceeding at a speed which made it impossible to stop the tug and tow when the operators thereof knew or should have known of the impending collision and in failing to keep the tug and barge under such control that they could have been stopped or otherwise maneuvered so as to have avoided colliding with libelant's bridge and in failing and neglecting to give the signal required by the regulations and waiting thereafter until some affirmative evidence had been furnished by the bridge or its tenders that the bridge was in readiness for the tug and tow to proceed.

4. The evidence as presented to the trial court does not justify finding of any fault or negligence on the part of appellant, but such evidence affirmatively shows that appellant was free from negligence. The trial court erred in not so finding.

5. If this court should find that appellant is not entitled to full recovery, then in the alternative, appellant is at least entitled to contribution from and against respondents.

6. The trial court erred in finding and decreeing that Russell Family, Inc., have and recover from appellant the sum of \$3306.11 or any other sum.

In considering these points it will be necessary that the court consider the entire testimony, including the exhibits, the pleadings of the respective parties, the findings of fact, conclusions of law and decree, libelant's exceptions and objections thereto and appellant hereby designates said portions of the record as material to the consideration of the appeal made to this court in this cause.

Respectfully submitted this 14th day of August, 1951.

/s/ H. LAWRENCE LISTER,
Of Proctors for Oregon-Washington Bridge Com-
pany, Appellant.

Service of the within Appellant's Statement of Points on Appeal and Designation of Record is hereby accepted in Multnomah County, Oregon, this 14th day of August, 1951, by receiving a copy thereof, duly certified to as such by H. Lawrence Lister, of Proctors for Oregon-Washington Bridge Company.

/s/ WILLIAM F. WHITE,

Of Proctors for Respondent, Russell Family, Inc.,
et al.

/s/ ERSKINE B. WOOD,

Of Proctors for Respondent, Russell Towboat and
Moorage Company.

[Endorsed]: Filed August 16, 1951.

United States
COURT OF APPEALS
for the Ninth Circuit

OREGON-WASHINGTON BRIDGE COMPANY,
Appellant,
vs.

TUG "LEW RUSSELL, SR.," and CRANE BARGE
No. 25, RUSSELL FAMILY, INC., RUSSELL
TOWBOAT AND MOORAGE COMPANY,
Appellees.

BRIEF OF APPELLANT
OREGON-WASHINGTON BRIDGE COMPANY,
a Corporation.

Upon Appeal from the District Court of the United
States for the District of Oregon.

WOOD, MATTHIESSEN & WOOD,
ERSKINE WOOD, and
LOFTON L. TATUM,
Yeon Building,
Portland, Oregon,
Proctors for Appellee,
Tug "Lew Russell, Sr."
THOMAS J. WHITE, and
WILLIAM F. WHITE,
Jackson Tower.
Portland, Oregon,
Proctors for Appellee,
Crane Barge No. 25.

GRAY & LISTER,
H. LAWRENCE LISTER,
1021 Equitable Building,
Portland, Oregon,
Proctors for Appellant.

FILED

NOV - 8 1951

PAUL B. O'BRIEN

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United States
COURT OF APPEALS
for the Ninth Circuit

OREGON-WASHINGTON BRIDGE COMPANY,
Appellant,

vs.

TUG "LEW RUSSELL, SR.," and CRANE BARGE
No. 25, RUSSELL FAMILY, INC., RUSSELL
TOWBOAT AND MOORAGE COMPANY,
Appellees.

BRIEF OF APPELLANT
OREGON-WASHINGTON BRIDGE COMPANY,
a Corporation.

Upon Appeal from the District Court of the United
States for the District of Oregon.

JURISDICTION

This is an appeal from a final decree entered by the District Court in a cause in admiralty. Therefore this Court has jurisdiction of the appeal.

STATEMENT OF THE CASE

Appellant, Oregon-Washington Bridge Company, is appealing from the judgment of the Trial Court, denying it recovery for damages sustained when its Hood River-White Salmon highway bridge across the Columbia River at Hood River, Oregon, was struck by the end of a boom on Crane Barge No. 25 propelled by the Tug "Lew Russell, Sr.," owned by Russell Towboat and Moorage Company. The crane barge and crane were owned by Russell Family, Inc. This owner intervened and made claim against appellant because of damage to the crane barge and the crane. The Trial Court allowed appellee, Russell Family, Inc., a judgment of \$3,306.11 against appellant. Appellant has appealed from said final decree made and entered March 5, 1951.

The Hood River-White Salmon Bridge was opened for traffic in December, 1924. It was designed, built and operated under the supervision of E. M. Chandler who is president of the Oregon-Washington Bridge Company and has been its engineer in charge of the bridge ever since it was started.

Originally it had no lift span but when the dam was put across the Columbia River at Bonneville, the level of the water was raised to such extent that it became necessary or desirable to have a lift span, which was completed in April, 1940. Libelant's Exhibit No. 14 shows the bridge after the lift span had been added.

The lift span is about 262 feet long. The center of the lift span is theoretically the boundary line between

the State of Oregon and the State of Washington and was the center of the thread of the current at the time the bridge was built. In the center of the lift span is a toll house. Just north of the lift span and about 25 feet above the roadway is what is called the control house or operator's house. Mr. Chandler marked this with a letter "X" on libelant's Exhibit No. 14 (Ap. 176).

In designing the lift span, which was done in conjunction with the War Department and paid for by the Federal Government, a light was installed in the center of the lift span so that when the span starts to lift the light goes on automatically and remains red. When the lift span reaches the top the light turns green. The witness Harold Benson estimated the diameter of this light at about 8 or 10 inches (Ap. 128). Mr. Chandler said it reflects quite a bright light—much brighter than the traffic control lights at street intersections. An air whistle operated by a motor was installed on the bridge in accordance with the plans worked out in conjunction with the War Department.

An excerpt from part 203, Bridge Regulations adopted pursuant to the provisions of section 5 of the Rivers and Harbors Act, August 18, 1894, was admitted in evidence as libelant's Exhibit No. 16. This regulation provides among other things that the authorized representative of the owner of the bridge shall arrange for the prompt opening of the draw upon signal at the time specified in the notice for passage of the vessel. It is expressly provided that the call for the opening of the draw shall be one long, two short and one long blast as a signal for the opening of the draw.

The evidence shows that in the evening of June 12, 1950, someone who was not identified at the trial, called the representatives of the owner of the Hood River-White Salmon Highway Bridge at Hood River, Oregon, and stated that some vessel which was unable to pass under the closed bridge desired to pass through the draw and would be there for that purpose at about 8:30 A.M., June 13. Mr. O. H. Adams, an employee of the bridge company, was on duty at 8:30 A.M. on June 13. The equipment did not show up at this time, but sometime around 11:30 A.M. he identified what he assumed to be this equipment approaching from the downstream or westerly side of the bridge. Mr. Adams thereupon called Harold Benson, an electrician, who came to the bridge to stand by and to assist Mr. Adams in opening the span for the oncoming equipment. Mr. Adams had worked on the Hood River-White Salmon Bridge for a couple of years and Mr. Benson had served in a stand-by capacity for a number of years and at all times when he was available had been called to stand by or participate whenever the lift span of the bridge was raised for the passage of river traffic.

Although the signal required by libelant's Exhibit No. 16 was not given, Mr. Adams assumed that the approaching craft was that of which advance notice had been given in the evening of June 12. Mr. Adams and Mr. Benson proceeded to open the draw of the bridge. However, when it had been raised about $13\frac{1}{2}$ feet, it stopped because of a power failure at the P.U.D. which supplied the power for raising and lowering this span. It was, in effect, admitted at the trial that libelant had

made proper inspections of the lift span and there was no showing of any negligence on the part of libelant in connection with the power failure or the inability to raise the lift span higher (Ap. 41, 186). It was admitted at the trial that the only cause of the accident was the power failure (Ap. 186). In the Trial Court's findings (Ap. 41) the Trial Judge said he did not find the bridge was negligent by reason of the fact that a power failure prevented it from raising the span higher, but the Trial Judge did express the opinion that the bridge was negligent in not maintaining an auxiliary whistle or some other signaling device not dependent upon the bridge's power lines which could be used in the event of a power failure or other emergency.

As soon as it was discovered that the power had failed, Mr. Adams rushed out of the control tower where he and Mr. Benson had been working onto the southerly end of a platform which went around the west, north and east sides of the control tower and which extended southerly from the easterly end of the control tower. In this position Mr. Adams waved his hat and shouted to the oncoming craft and its operators. The whistle could not be blown because it was operated by the same power which had failed.

The tug had a crew of four persons. Only one of these persons was on duty, however, as the tug and its tow approached the Hood River-White Salmon Bridge. One other member of the crew had left his quarters shortly before the impact and said he was standing on the "Texas" deck of the tug, portside, approximately eight or nine feet below the pilot house.

As the Tug "Lew Russell, Sr." approached the Hood River-White Salmon Bridge, it was pushing a barge in front of it which had about four or five inches freeboard (Ap. 264). Crane Barge No. 25, a converted L.S.M. type steel hull vessel, approximately 200 feet long and a 34 foot beam without propulsion machinery, was being pushed forward and to the starboard of the Tug "Lew Russell, Sr." The combined length of the tug and tow was about 265 feet (Ap. 232). A crane was bolted to the deck of the barge about half-way between the middle of the barge and the stern and from its base a long boom extended upward and forward under which was loaded a small L.C.M. called the "Laura Louise". We could not get the pilot of the tug to state how high the end of the boom was above the level of the water (Ap. 244, 245), but he testified that the top of the boom came within three feet of clearing the bridge (Ap. 231). Some of the photographs marked as libelant's Exhibits 1 through 11 show the boom in the position it was immediately after the accident. According to the pilot the boom was about 110 feet long (Ap. 230).

Witnesses for respondents testified that some one-quarter of a mile downstream from the bridge the engines on the tug were cut off and that the momentum of the tug and its tow decreased from four miles per hour to some one-half mile per hour. Appellant's witnesses testified that they saw no indication of any stopping or decreasing the speed of the oncoming tug and tow.

In any event the tug and its tow did proceed forward without any affirmative signal from the bridge or

without giving any affirmative signal on its own account. The pilot of the tug, who was the only one on duty, was in the pilot house and some twenty-five feet above the level of the water. He claims that it was difficult for him in his position to estimate the relative height of the draw span and the top of the boom. He testified that the tip of the boom was approximately ten or fifteen feet, fifteen feet at the most from the bridge when he saw there was danger and reversed his engines (Ap. 233).

The lower member of the draw span was struck just north of center by the boom a few feet beneath its extreme top. The boom carried on through the bridge. It was necessary to put the bridge on limited use for a period of thirty-one days while temporary repairs were made. The uncontradicted testimony shows that appellant sustained damages exceeding the \$30,621.18 alleged in its libel.

We submit the evidence clearly shows that respondents failed to maintain a proper lookout and did not keep the tug and tow under control but were proceeding at a speed such that they could not stop or otherwise maneuver the tug and tow and that this negligence is the proximate cause of the accident and the damages incurred and that appellant should recover full damages. Even though this Court should agree with the conclusion of law reached by the Trial Court that appellant should have had some auxiliary signal device, appellant would in any event be entitled to contribution from the tug and its operator and the damages should be divided between appellant and respondent, Russell Towboat and Moorage Company.

ASSIGNMENTS OF ERROR

Appellant's Assignments of Error are set forth in the Apostles pages 48 through 51. Said Assignments of Error are for the convenience of the Court attached to this brief as an appendix. We desire to present the following

POINTS ON APPEAL

I.

This being an appeal in admiralty it will be tried de novo. The SS Bellatrix, 114 F. (2d) 1004; City of Cleveland vs. McIver, 109 F. (2d) 69.

ARGUMENT

We recognize that this Court will give great weight to the findings of fact made by the Trial Judge. However, this being an appeal in admiralty this Court is entitled and required to consider the matter de novo and the Court is not bound by conclusions of law made by the Trial Court even though these conclusions of law are designated findings of fact. For example, we understand this Court would have to give great weight to the finding of the Trial Court that there had been power failures on at least three occasions prior to June 13, 1950 (Ap. 39) even though the only specific testimony on this point so far as we can recall is that of the witness Benson who said there had been power failures on two occasions that he could remember (Ap. 137). We do not understand that this Court is bound by the findings

of the Trial Court when they are so clearly wrong. The only criticism of appellant made by the Trial Court and the only finding of fact made by the Trial Court which in any way can serve as a basis of liability on the part of appellant is that appellant did not have any auxiliary whistle or other emergency signal of any kind on the bridge which could be operated in the event of a power failure. It is a fact that there was no auxiliary whistle, but whether or not appellant was in duty bound to maintain or provide an auxiliary whistle or other emergency signal is a question of law and not a question of fact and any conclusion reached in this regard by the Trial Court would be a conclusion of law rather than a finding of fact and therefore would not be binding upon this Court.

We think the distinction is illustrated in *New St. L. & Calhoun Packet Corp. v. Pa. R. Co.*, 194 S.W. (2d) 977, 982, 302 Ky. 693. The court said:

“ * * * The general rule is that while determination of the degree of care is one for the court (272 Ky. 339, 114 S.W. (2nd) 89) whether care was exercised in discharge of a duty, is generally a question for the jury. *Jones v. Sharp's, Administrator*, 282 Ky. 638, 139 S.W. (2nd) 731.”

In our case there is no question in fact as to what the operators of the bridge did and how they did it. There is no contradiction to the testimony that as soon as it was discovered that the power had failed and that the whistle would not blow, Mr. Adams rushed out onto the southerly end of the platform around the control tower and there signalled and shouted to the oncoming

tug and tow. Whether there was any responsibility on the part of appellant to provide other means of warning is a question of law and involves a determination of the degree of care which is a question of law for the Court to decide and not a question of fact to be determined by the trier of the facts.

POINTS ON APPEAL

II.

There is no showing that lack of auxiliary whistle or other emergency signal in any way contributed to the accident and the damages complained of.

ARGUMENT

The Trial Court found that the tug and tow came to a stop more than a quarter of a mile below the bridge (Ap. 38). The testimony of the pilot of the tug shows that the equipment did not come to a complete stop but that its speed was reduced to about one-half mile per hour (Ap. 248). Thereupon, and without giving any signal and without receiving any signal from the bridge, the pilot testified that he saw the lift span had come to a halt. He then started his engines and resumed progress toward the bridge with his engines turning over about 400 revolutions per minute, building up a speed to about one and one-half miles per hour (Ap. 248). Thereafter, and without any lookout other than that which he himself could maintain from his position in the pilot house and with his eyes fixed on the end of the boom in an attempt to determine whether or not the boom

would pass under the lift span, he proceeded toward the bridge and the point of impact. In the meantime and as soon as it was determined that there was no power to operate the whistle, Mr. Adams rushed out on the platform extending southerly from the southeastern corner of the control tower. From this point he waved his hat and hollered at the oncoming tug and tow. It is true that there was a bridge member fourteen inches square in the western edge of the bridge slightly south of the point from which Mr. Adams was attempting to signal the approaching tug and its tow. There was also a diagonal member which extended from this upright member in a northerly direction. Other than this there was no obstruction to the view. Libelant's Exhibit No. 14 shows the location of the various bridge members.

The testimony shows that the lift span is over 260 feet long. The pilot testified that from a point one-quarter of a mile downstream he moved forward toward the center of the lift span without changing his course and apparently without making any observation other than to watch the end of the boom to see whether or not it would clear the lift span. It is very obvious that for a considerable distance prior to the point of impact, Mr. Adams must have been full view of the pilot on the tug if he had looked.

Mr. Adams also testified that there was a strong wind blowing upstream. He testified that he shouted in an attempted to attract the attention of the pilot. What is there in the record to indicate that the pilot on the tug would have heard any auxiliary whistle that could

have been used by libelant or that he could have heard any whistle. Mr. Chandler, Mr. Adams and Mr. Benson all testified that without exception whistles had been blown, signalling craft when the lift span was in position for the craft to pass through. Appellee's witnesses testified that they had been through the bridge on two or more occasions prior to June 13, 1950 when the lift span was raised and that they had never heard a whistle. How, then, can it be contended that the pilot alone in the pilot house would have heard an emergency whistle had one been blown?

At the trial considerable point was made by proctors for appellees that there was no significance in the whistles habitually blown by appellant to advise river craft when the draw was sufficiently raised because there was no provision for such whistles in the Army regulations relating to the bridge. Likewise, there is no provision in said regulations requiring emergency or auxiliary signals or whistles. Even if there had been emergency signals or auxiliary whistles and these had been used to the knowledge of the tug pilot, what do we have to show that said pilot would have properly interpreted these signals or whistles? His own testimony shows that he was so intent on watching the top of the boom and its relation to the lift span that he was practically oblivious to all other conditions and considerations.

The testimony shows that there was a red light in the middle of the lift span which had a red reflector and which Mr. Chandler describes as being bigger and more

easily seen than ordinary traffic signals. The operator of the tug and tow said he did not see this light. He said he was looking straight ahead, and was watching the end of the boom which was directed almost at the middle of the lift span. The contact was made immediately north of the middle of this lift span. It must be remembered that this light was never seen by the tug operator. If he could not see this red light directly in the middle of the lift span to which he testified he was directing his attention and which he claims he could see vividly enough to determine when it had come to rest, then how could he see any emergency signal which reasonably could be required of appellant? A very short time elapsed from the moment it was discovered by the bridge tender that the power had failed to the moment of impact. It would seem to us to be the utmost conjecture and speculation to try to determine whether or not more effective warning could have been given.

We submit the evidence requires the conclusion that the operator of the tug would not have seen a flag regardless of the fact that a whistle had been blown or a flag had been waved.

Mr. Lew Russell, Sr., president of Russell Towboat and Moorage Company, and secretary and manager of Russell Family, Inc., called as a witness on behalf of appellees, testified that he had gone through the bridge when the lift span was raised on about three occasions prior to June 13, 1950. He testified he had never noticed a red light in the day time. When asked how far he could see red traffic lights in the day time, he an-

swered "From twenty-five feet away" (Ap. 279). If this fairly represents the ability of appellees and their personnel to see danger signals, then we respectfully submit that it would have been impossible for appellant to have provided emergency or auxiliary signals or whistles which would have protected appellees and the operators of their river craft.

The record shows that the Trial Court was not much impressed with the importance of the red light and indicated a reluctance to attach much significance to the red light shining in the day time. We are willing to submit our case on the proposition that the Court can vividly distinguish a red street traffic signal in the day time with the sun shining for a distance in excess of one-quarter mile. Inasmuch as the tug operator did not see this light at any time and inasmuch as the light was centered in that part of the bridge span toward which he was moving, it seems clear to us that the operator would not have seen any reasonable signal or flag that could have been used by or required of appellant. It is not to be wondered that he did not see Mr. Adams who was waving his hat from a point some 130 feet northerly of the course which the tug was pursuing. It is uncontroverted that Mr. Adams could see the pilot and that there was no obstruction which kept Mr. Adams from seeing the pilot. By the same token the pilot should have seen Adams if he had been watching.

The Trial Court erred in concluding that reasonable prudence required some emergency signal or auxiliary whistle on the bridge. It must be remembered that very

few craft moving under the bridge required the lift span to be raised. For example, Mr. Lew Russell, Jr. testified that he had made many hundreds of trips underneath the bridge and that on approximately three occasions it was necessary to lift the span (Ap. 278). Thus the situation differs from the City of Portland where craft are moving back and forth constantly and where the bridges are required to be opened several times each day. In order to be free from negligence one is only required to exercise due care in the light of all the facts and circumstances. Much more might be required of a bridge operator in the City of Portland than would be required of a bridge operator at Hood River where traffic conditions are altogether different. There was no statute or regulation requiring auxiliary whistles or emergency signals. There is nothing in the record to indicate that an ordinarily prudent person in the same position as was appellant would have done anything other than that done by appellant. The record fails to show that any reasonable auxiliary whistle or emergency signal would have been observed or comprehended by appellees' representatives.

POINTS ON APPEAL

III.

Appellees rely on the proposition that in the absence of proper warning a vessel approaching a bridge over navigable waters has the right to assume that the bridge will be timely opened for traffic.

ARGUMENT

In support of this proposition counsel relies, among others, upon *Cement v. Metropolitan West Side El. Ry. Co.*, 123 F. 271, which is a widely cited decision. In this case we note the court points out that the ship was manned by a capable captain as master in a proper position in the pilot house and it had on watch a first mate and a mariner. It should be noted that even in this case, p. 273, the court said:

“A vessel, *having given proper signal* to open the bridge and *prudently proceeding* under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage.” (Emphasis ours)

In the statement of facts it was pointed out that the master saw that the bridge was not opening when he was from 125 to 135 feet away from the bridge and when he was passing through another bridge. He had given timely signal. In our case the approaching tug gave no signal; it had not waited for any affirmative sign from the bridge or its operators that it was in readiness to permit the passage of the tug and tow. The tug was not manned by a captain in a proper position to observe whether or not the bridge was sufficiently opened. It had no one on lookout. It was not proceeding prudently. Appellees did not bring themselves within the rule announced by the *Cement* case and the other cases in which the decision has been cited.

Almost without exception there are facts and circumstances pointed out in the various cases cited by counsel for appellees which distinguish those cases from

the one under consideration. For example, the SS *Bellatrix*, 114 F. (2d) 1004, 1006, says:

“A ship may, therefore, proceed on her course toward a drawbridge upon the assumption that the draw will be opened timely, especially where, as in the present case, the ship signals punctually for the opening and is answered affirmatively by the draw tender.”

If the operators of the Hood River-White Salmon Bridge had given some affirmative signal to the tug signifying the readiness of the bridge to admit the passage of the tug and thereafter had failed to have the way clear, we would have a situation comparable to that considered by the court in the *Bellatrix* case, 114 F. (2d) 1004.

Inasmuch as it is admitted that the lift span stopped at thirteen and one-half feet through no fault or neglect on the part of appellant, it would seem that the ruling in *Newton Creek Towing Co. v. City of New York*, 49 F. (2d) 475, is more nearly in point than are the cases relied upon by counsel for appellees. In the *Newton Creek Towing Co.* case where a key in a gear on a shaft broke without any way for the bridge operator to be warned of the break, the court held that the City was not negligent. At p. 476 the court said:

“The authorities cited by libelant are quite remote in point of facts involved, and do not aid in the disposition of this cause.”

Among the cases cited by libelant in the *Newton Creek Towing Co.* case is *Cement v. Metropolitan West Side El. Ry. Co.*, 123 F. 271, and this is one of the cases which the court in the *Newton Creek Towing Co.* case

refused to follow. Likewise, it should not be followed in our case.

In *City of Chicago v. Wisconsin SS Co.*, 97 F. 107, 110, 111, it was shown that a lock was provided at one end of the draw of a bridge. It was contended that it should have had a lock at each end. This is somewhat like the contention of appellees in our case that the bridge should have emergency signaling devices. The court said:

“We think the city cannot be charged with negligence in failing to have a lock at both ends of the bridge, though that probably would have lent additional safety. The object of the lock is merely to hold the bridge in position over the center protection, and not to resist the impact of a moving vessel * * *. While such additional lock might have increased its resisting power, it is merely a matter of conjecture whether it would have been sufficient to prevent a collision. There is no allegation in the libel upon the subject. The duty of the city in that regard was not to supply every possible protection, but only such as experience shows to be necessary in the usual use of the bridge.”

Likewise, appellant in our case does not have the duty of supplying every possible protection but only such as experience shows necessary in the usual use of the bridge. On no other occasion during the entire life of the lift span had any difficulty been experienced in raising the said lift span. On no other occasion had the whistle provided for signaling purposes failed to work. Paraphrasing the language in the use by the court in the *City of Chicago* case, while such additional signaling device might have increased the ability of the bridge

operator to give warning, it is merely a matter of conjecture whether any additional signaling device would have been sufficient to prevent a collision. In fact, the almost overwhelming weight of the testimony is to the contrary. As we have pointed out, the tug operators had never heard the whistle in the past; they did not hear Mr. Adams shouting on the day of the accident; they did not see him waving his hat.

In *Connors Marine Co. v. New York and Long Branch R. Co.*, 87 F. Supp. 132, 134, the court says:

“Furthermore, it would seem logical that where a moving vessel collides with a drawbridge, there is a presumption of negligence on the part of the vessel.”

In *New St. L. & Calhoun Packet Corp. v. Pa. R. Co.*, 194 S.W. (2d) 977, 982, 302 Ky. 693, in considering the responsibility of the railway company for a breakdown of its bridge, the court said that the railway company, defendant, was only obliged to use ordinary care in the maintenance and inspection of its bridge span.

It must be remembered that it is only after a vessel has given proper signal to open the bridge and is prudently proceeding under slow speed that it has in the absence of proper warning the right to assume that a bridge will be timely opened for its passage. In our case no signal of any kind had been given, although one is expressly required by the Army regulations in effect at the time the accident happened. The tug was not proceeding at a sufficiently slow speed under the circumstances and it certainly was not prudently proceeding inasmuch as it had no proper lookout.

POINTS ON APPEAL

IV.

It is a primary rule of navigation that all moving vessels shall maintain a careful and efficient lookout. The failure of appellees to maintain a proper lookout was the direct and proximate cause of the accident and the damages complained of.

ARGUMENT

In *Dahlmer v. Bay State Dredging & Contracting Co.*, 26 F. (2d) 603, 605, where the *Orion*, a moving vessel, collided with moored scows, the court said:

“But, even if it were held that the scows were improperly moored, such fact alone would not bar a recovery, if the collision could have been averted by the exercise of reasonable diligence on the part of those in charge of the *Orion*.”

Further on at p. 605 the court says:

“It is a primary rule of navigation that all moving vessels shall maintain a careful and efficient lookout. The lookout is ‘both eyes and ears of the ship’; he must be properly stationed on the forward part of the vessel and must be held to a high degree of vigilance in that position. Neither the captain nor the helmsman in the pilot house can be considered to be ‘lookouts’ within the meaning of the maritime law.”

The *Ariadne*, 13 Wall 475, 478, 20 L. Ed. 205, one of the cases cited, points out the importance of a lookout.

The *Genessee Chief*, 53 U.S. 443, 462, 13 L. Ed. 1058, is also cited by the court in support of its ruling in 26

F. (2d) at 605 and while the court was there considering a collision between two vessels, the reasoning of the court would seem equally appropriate to a situation where the operator of the Tug "Lew Russell, Sr." testified that he was in a position where he could not readily or accurately determine how high the lift span had been raised or whether or not the boom would pass under it.

The Oregon, 158 U.S. 186, 193, 15 S. Ct. 804, 39 L. Ed. 943, is another case cited in 26 F. (2d) at 605. This decision grew out of a collision between the moving Oregon and the anchored Clan Mackenzie. The libel charged the Oregon with fault in not having a proper lookout or a competent pilot and in failing to keep out of the way of the Clan Mackenzie.

The charterer of the Oregon cross-libeled charging fault of the Clan Mackenzie in failing to display a proper anchor light, to keep a proper anchor watch, or to call the steamer's attention by shouting, ringing the ship's bell or showing a lantern or torch.

On p. 197 the court stresses the fact that the lookout on the Clan Mackenzie repeatedly hailed the steamer.

On p. 202 the court considers the claim made for the Oregon that those on the Clan Mackenzie should have done something in addition to that which had been done. It then points out that inasmuch as the Clan Mackenzie did in fact hail the steamer, the Oregon was forced to abandon this position. On p. 203 the court said:

"If the courts were at liberty to add to the requirements of the statute, it would always be

claimed that the signal added was not the proper signal that should have been used."

While in *The Oregon* it was shown that the regulation light had been displayed on the *Clan Mackenzie* it was contended by *The Oregon* that such light was misunderstood as in our case the operator of the tug claims he was misled by the draw having come to rest. In our case there is no statute or regulation requiring a light or other signal, but in fact the bridge did have a light and a whistle. The light was red for oncoming traffic and at no time turned green. It was never seen by the tug operators. The whistle could not be blown because of conditions beyond the control of the bridge and the bridge operators and without any fault on the part of the bridge operators. They gave prompt warning by signaling and by hailing the tug. If the court is going to say that they should have had an auxiliary whistle or a flag, the reasoning of the Supreme Court in *The Oregon* is pertinent for the tug operator and the witness each claimed that he had gone through the bridge with the draw lifted on two or three occasions and that neither of them had ever heard a whistle, though the testimony of libelant's witnesses shows that in fact the whistle uniformly had been blown on all occasions when the bridge was in readiness for the passage of river craft after the draw had been raised. Regardless of the type of flag that was used by libelant it could always be contended that some other type should have been used or that it should have been exhibited from some other position.

At the time of the accident there was no requirement by statute, regulation or otherwise that a whistle should be blown or a flag should be shown on the bridge. The cases relied upon by appellees are not in point, for without exception, they deal with situations where the moving craft had given a whistle or signal required by statute or regulation and had either received an answering signal or where circumstances have been pointed out which the court held justified the ship's operator in moving forward without waiting for the answering signal. In our case the signal required by regulation was not given by the tug and no answering signal was given by the bridge. Everyone admitted the day was clear and visibility good. If someone had been keeping lookout at a point where he could have seen effectively, the accident could easily have been avoided.

If the tug operator saw fit to assume that the bridge was in readiness when admittedly he was in no position to determine the height of the draw in relation to the top of the boom, his principal is responsible for his erroneous assumption. According to his own testimony there were three other men on the tug. One of these men was supposed to be on duty with him. He saw fit to advance on the bridge without any lookout and without even knowing where his deckhand was.

If the tug operator could see only as poorly as he claimed, how could he determine from one-quarter mile distance that the lift span had come to rest? What have we in the record to show that any emergency equipment could have been put in operation were such available

between the time it was learned that the bridge could not be opened and the time the tug and tow were so close to the bridge that they could not be stopped.

In *The Oregon* at p. 204 the court points out that it takes time to obtain and use emergency equipment. As the court said in *The Oregon* case as soon as the bridge tender learned that the power had failed, he did that which in the excitement of the moment, seemed to him best. On p. 204 of *The Oregon* decision it is said that while it is possible that a bell might have called the attention of the approaching steamer, it is by no means certain that it would have done so and whether or not the lookout acted wisely he evidently used his best judgment which is all he was required to do under the circumstances. So, in our case. The court continues that it was not prepared to say that a hail could not have been heard as far as a bell, and considering the character of the lookout that was kept on *The Oregon*, it is very doubtful whether a bell would have been heard or regarded. In our case only the pilot was on lookout. He admittedly was in a poor place to see. He had never heard whistles from the bridge on other occasions. How can it be assumed that he would have heard or regarded any reasonable signal or whistle that the bridge could give by emergency equipment? Obviously if a flag to be manually exhibited had been at any place other than the control tower it could not have been reached in the emergency and could not have been used by the bridge tender.

In *The Paris*, 37 F. (2d) 734, 739, the court points out the necessity for proper lookouts on moving vessels.

While the ship there involved was a large passenger ship and was moving in the New York harbor, the same reasoning should apply to any moving craft. It would seem particularly applicable to a situation such as ours where a craft was approaching an obstacle to navigation with only one person on duty and he in such place that he could not see accurately and quite probably his hearing was made difficult by the pilot house in which he stood and the noise from the engines. If he wanted to take the chance that the bridge was open, no signal having been given to him by the bridge, he should have had someone forward who would have had the maximum opportunity to observe and hear warnings from the bridge. If such lookout had been kept, we are entitled to assume that the signals given by Mr. Adams would have been observed. Appellees cannot relieve themselves of their obvious failure by seeking to require appellant to provide an emergency sound or flag signal that would have penetrated into the pilot house and into the consciousness of the man who was then and there gambling that he could move his lofty tow under the partly raised bridge and who had his attention riveted on the outcome of his gamble.

In *Texas & P. Ry. Co. v. Angola Transfer Co.*, 18 F. (2d) 18, it was held that a bridge owner was not required to put temporary fenders around caps submerged by extraordinary high water since there was nothing to put the bridge owner on notice that an accident was liable to happen.

The same reasoning can be applied in our case. The evidence shows that there had only been two prior power

failures and there had never been a time when the lift span had failed to operate. The bridge operators had set up a procedure which would have protected the moving craft and have absolutely prevented collision if the craft had only waited until it had received a signal from the bridge before attempting to pass under the draw.

In *The Orange*, 68 F. (2d) 307, 308, the Circuit Court said it accepts the findings of the trial court but did not agree with its point of law. It modified the decree by holding both vessels at fault and divided damages.

In doing so it pointed out the necessity of having a lookout where he could see. It being admitted in our case that only one man was on duty and he in such position that he could not determine the height of the draw span or whether or not the top of the crane boom would clear, the tug had no proper lookout. Even though this Court should agree with the trial court that there was fault on the part of the bridge operator in not having auxiliary signals and should reach the conclusion that libelant was clearly to blame and therefore look at the tug operator with a friendly eye, still as the appellate court in the 2nd Circuit said 68 F. (2d) at 308, the tug still seems to have been without the necessary lookout and therefore at fault, requiring a division of damages.

In *The Koyei Maru*, 96 F. (2d) 652 (9th Ct. May 3, 1938), the court points out the importance of lookout and while there was a collision between the moving

Maru and a tug and tow, the reasons for lookout would not be different in our case. It would seem that it was even more obviously negligent that the tug operated by a single pilot, knowingly in a poor place to see and consciously approaching impaired clearance, should fail to have a lookout at the most advantageous location and with nothing on his mind except to keep proper lookout.

On p. 654 the court concluded by quoting:

“ * * * Every doubt as to the performance of the duty, and the effect of non performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.”

In *The Perth Amboy*, 48 F. (2d) 640, where the tug grounded its tow on a shallow part of the channel, the court applied the rule requiring adequate and proper lookout. In doing so it cited among others *Dahlmer v. Bay State Dredging & Contracting Co.*, 26 F. (2d) 603, and *The Oregon*, 158 U.S. 186, 15 S. Ct. 804, 39 L. Ed. 943.

On p. 644 the court said the lookout could have been some 90 feet forward and in a better position to make observation which would have enabled the navigator to keep off the shoals. So in our case the crane barge was 200 feet long and it was being pushed ahead of the tug; therefore, a lookout could have been more than 200 feet nearer the bridge than was the pilot.

The pilot said he saw the boom was going to hit the bridge when it was some 10 to 15 feet distant (Ap. 230). The pilot testified that at the time and place and against

the current he could have brought his tow to a standstill in one-half of its length (Ap. 233). The crane barge which was the longest part of the tow was approximately 200 feet long (Ap. 269, 276). The crane barge was forward of the tug and to the right of a loaded gravel barge which was immediately in front of the tug (Ap. 232). Pilot Sadewasser testified that the boom was 110 feet long (Ap. 230). The base of this boom was fastened at a point on the deck of Crane Barge 25 about half way between the center and the stern (Ap. 277). It can thus be seen that if a proper lookout had been stationed on the forward end of Crane Barge 25 he would have been some 200 feet closer to the bridge than was the pilot in the pilot house. We certainly are justified in assuming that instead of seeing that the collision was imminent when the end of the boom was some ten to fifteen feet from the bridge he would have been able to see the danger when the boom was 210 to 215 feet away. If the pilot is correct in saying that he could have stopped the tug and tow within one-half the length of the tow or within 100 feet there would have been ample time for him to have stopped the tug and tow after a proper lookout would have been warned of the danger. If there had been an adequate and proper lookout the accident never would have happened, even if full credit is given to all the testimony offered by witnesses for appellees.

POINTS ON APPEAL

V.

Considering the record most strongly in favor of appellees it is clear that there was at least contributing fault on the part of appellee, Russell Towboat and Moorage Co., and it should be assessed at least one-half of the damages.

ARGUMENT

The evidence seems to show conclusively that the collision and the resulting damage, both to the bridge and the crane barge, were direct and proximately caused by the failure of Russell Towboat and Moorage Co. in the operation of its tug "Lew Russell, Sr." to have a proper lookout and in attempting to proceed through the draw of the bridge without giving any signal and without being given any signal at such speed however slow that said tug and its tow could not be controlled before striking the bridge and causing the damage. Therefore, under well recognized admiralty rules, appellee, Russell Towboat and Moorage Co. should pay its proportionate part of the damages, even though this Court does sustain the Trial Court in its conclusion of law that appellant should have had auxiliary, emergency signaling devices. Griffin on Collision, p. 564; Robinson on Admiralty, p. 853; Steel All Welded Boat Co. v. City of Boston, 18 F. Supp. 421, 422; Connors Marine Co. v. New York & Long Branch R. Co., 87 F. Supp. 132, 135-136; The Marian, 66 F. (2d) 354, 357; The Ariadne, 80 U.S. (13 Wall) 475, 479, 20 L. Ed. 205.

In *Pacific Spruce Corp v. City & County of San Francisco*, 72 F. (2d) 712, 714, this Court recognized the admiralty doctrine of an equal division of damages in case of a collision between two vessels when both are at fault contributing to the collision but did not apply it.

We, therefore, feel that the very least this Court can do under the record now presented is to divide the damages between appellant and appellee, Russell Towboat and Moorage Co. In calling this rule to the Court's attention, we do not wish to recede from our position that the real, effective, direct and proximate cause of the collision and damage was the negligence as hereinabove pointed out of Russell Towboat and Moorage Co. and its representatives.

CONCLUSION

There being no contradiction to the evidence that appellant was damaged in excess of \$30,621.18 as alleged in the libel and the record showing that this damage was directly and proximately caused by the negligence of appellee, Russell Towboat and Moorage Co., appellant should be awarded its damages against appellee, Russell Towboat and Moorage Co., and the claim of appellee, Russell Family, Inc., should be dismissed. In the event this Court finds that there is mutual fault on the part of appellant and appellee, Russell Towboat and Moorage Co., then the entire damage should be divided between said parties in accordance with admiralty practices and procedures.

Respectfully submitted,

H. LAWRENCE LISTER,

GRAY & LISTER,

1021 Equitable Building,

Proctors for Appellant.

APPENDIX

ASSIGNMENTS OF ERROR

The libelant, Oregon-Washington Bridge Company, hereby assigns error in the proceedings, decrees, orders and decisions of the District Court in the above-entitled action as follows:

First. The District Court erred in failing and refusing to sustain libelant's exceptions and objections to the findings of fact, conclusions of law and decree made by the District Court in this cause on or about the 5th day of March, 1951.

Second. The District Court erred in finding that the tug and tow came to a stop more than a quarter of a mile below the bridge owned and operated by libelant.

Third. The District Court erred in finding that the navigator of the tug rightly and justifiably believed that the bridge tender had raised the bridge high enough to enable the tug and tow to pass through.

Fourth. The District Court erred in finding that it is immaterial that no signal required by the regulations promulgated by the Corps of Engineers was given by the tug in that under the decisions the giving of the signal required by statute is a condition precedent to any assumption on the part of the tug operator that the bridge would be in readiness for his tug and tow to pass through.

Fifth. The District Court erred in finding that there had been power failures on at least three occasions prior

to June 13, 1950, on the ground and for the reason that this finding is not consistent with the evidence.

Sixth. The District Court erred in finding that the line of vision between the tug operator and the bridge tender was obstructed by the steel work of the bridge upon the ground and for the reason that the exhibits in evidence and the testimony demonstrate that the bridge tender was clearly visible to the tug operator for a considerable distance and at least during the last three hundred feet traveled by said tug and tow prior to the impact with the bridge.

Seventh. The District Court erred in finding that the crane barge was damaged as a direct and proximate result of the negligence of libelant and its bridge.

Eighth. The District Court erred in incorporating in the findings of fact the opinion of the court set out in paragraph 6, pages 4 and 5, of the findings of fact.

Ninth. The District Court erred in making conclusions of law based upon the findings of fact and the District Court erred in making its decree based upon said findings of fact and said conclusions.

Tenth. The District Court erred in making its findings of fact, conclusions of law and its decree and each thereof in that each of said findings herein excepted to and the conclusions and decree based thereon are not supported by the evidence, but are contrary to the evidence and the law as applied to said evidence.

Eleventh. The District Court erred in failing and refusing to find that the collision and the resulting dam-

ages were caused by the failure of the tug and its operators to maintain a proper or any lookout, in proceeding at a speed which made it impossible to stop the tug and tow when the operator thereof became aware of the impending collision and in failing to keep the tug and barge under such control that it could have been stopped or otherwise maneuvered so as to have avoided colliding with the libelant's bridge and in failing and neglecting to give the signal required by the regulations and waiting thereafter until some affirmative evidence had been furnished by the bridge or its tenders that the bridge was in readiness for the tug and tow to proceed.

Twelfth. The District Court erred in finding and decreeing that Russell Family, Inc., have and recover from libelant, Oregon-Washington Bridge Company the sum of \$3,306.11.

/s/ H. LAWRENCE LISTER,
GRAY & LISTER,

Proctors for Appellant.

STATEMENT OF POINTS ON APPEAL

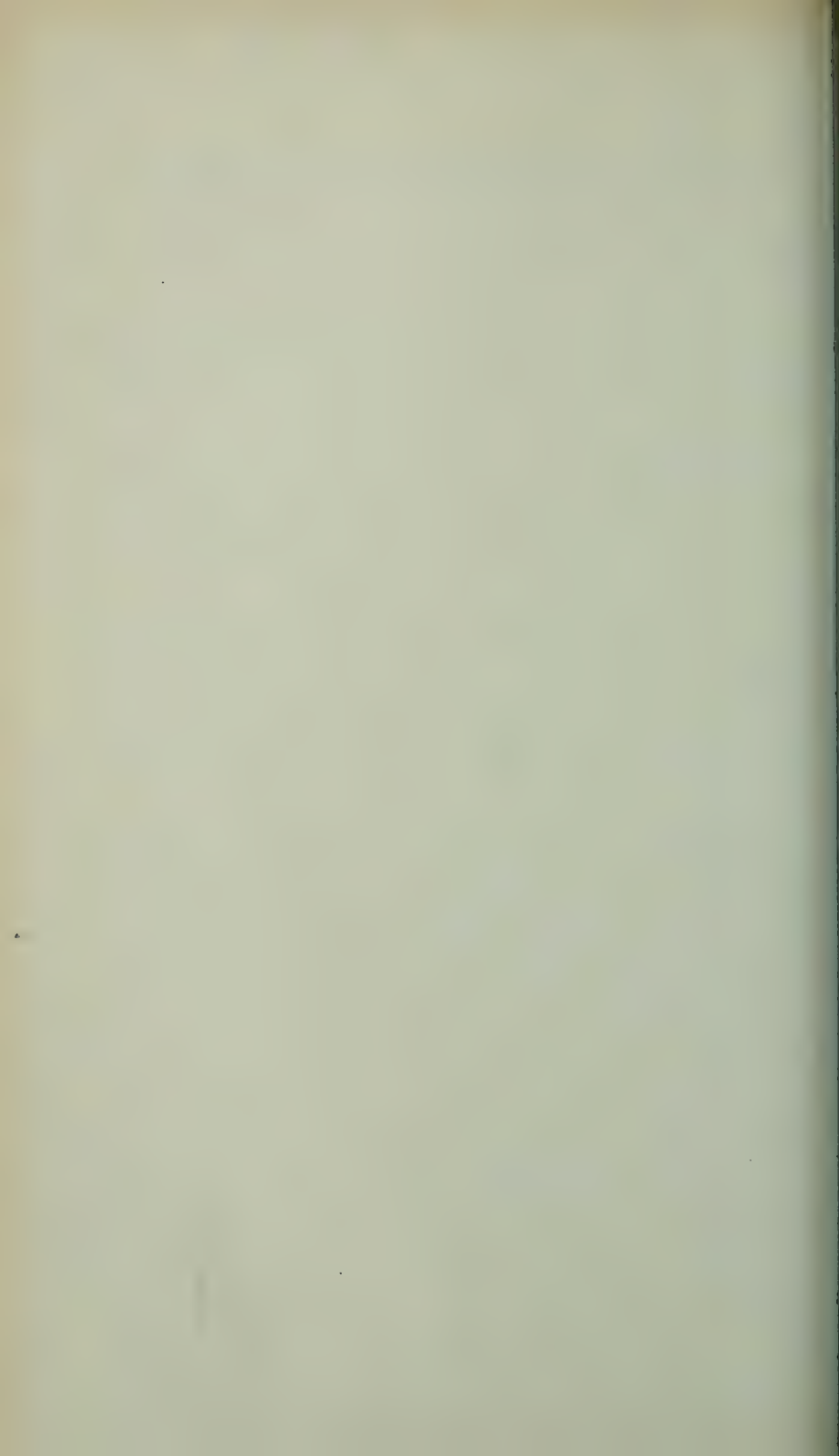
1. This being an appeal in admiralty it will be tried *de novo*.

2. There is no showing that lack of auxiliary whistle or other emergency signal in any way contributed to the accident and the damages complained of.

3. Appellees rely on the proposition that in the absence of proper warning a vessel approaching a bridge over navigable waters has the right to assume that the bridge will be timely opened for traffic.

4. It is a primary rule of navigation that all moving vessels shall maintain a careful and efficient lookout. The failure of appellees to maintain a proper lookout was the direct and proximate cause of the accident and the damages complained of.

5. Considering the record most strongly in favor of appellees it is clear that there was at least contributing fault on the part of appellee, Russell Towboat and Moorage Co., and it should be assessed at least one-half of the damages.



United States
COURT OF APPEALS
for the Ninth Circuit

OREGON-WASHINGTON BRIDGE COMPANY,
Appellant,

vs.

TUG "LEW RUSSELL, SR.," and CRANE BARGE
No. 25, RUSSELL FAMILY, INC., RUSSELL
TOWBOAT AND MOORAGE COMPANY,
Appellees.

BRIEF OF APPELLEES
CRANE BARGE No. 25 and her owner,
RUSSELL FAMILY, INC.

Upon Appeal from the District Court of the United
States for the District of Oregon.

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ERSKINE WOOD, and
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Tug "Lew Russell, Sr."
and her owner, RUSSELL TOWBOAT
& MOORAGE CO.

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WILLIAM F. WHITE,
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Portland, Oregon,
Proctors for Appellees,
Crane Barge No. 25, and her
owner, RUSSELL FAMILY, INC.

FILED

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PAUL P. O'BRIEN

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United States
COURT OF APPEALS
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OREGON-WASHINGTON BRIDGE COMPANY,
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vs.

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Appellees.

BRIEF OF APPELLEES
CRANE BARGE No. 25 and her owner,
RUSSELL FAMILY, INC.

Upon Appeal from the District Court of the United
States for the District of Oregon.

This brief is on behalf of Appellees CRANE BARGE NO. 25 and her owner, RUSSELL FAMILY, INC., an Oregon corporation.

These Appellees urge that this Court affirm the judgment of the District Court for the District of Oregon, and particularly that part of which requires Appellant (owner of bridge) to pay to Appellee, RUSSELL

FAMILY, INC., (owner of Crane Bargo No. 25) damages in undisputed amount of \$3,306.11 sustained to Crane Barge No. 25 when it collided with the bridge.

In interest of avoiding repetition these Appellees will stress the negligence of Appellant in operating its bridge and leave its co-appellees, Tug Lew Russell, Sr., and Russell Towboat and Moorage Company, through their able Proctor to answer other points raised by Appellant in its opening brief.

OPINION OF THE DISTRICT COURT

The oral opinion of Hon. Gus J. Solomon, Judge of the United States District Court for the District of Oregon, rendered from the bench in this cause is as follows: (40)*.

"I do not find any negligence on the part of either the tug or the barge, and I find that the bridge was negligent in not maintaining an auxiliary whistle or some other signaling device not dependent upon the bridge's power lines which could have been used in the event of a power failure or other emergency.

"The failure of the tug to signal the bridge to open the draw does not constitute negligence because the undisputed evidence shows that the bridge tender saw the tug and proceeded to raise the span when the tug was more than one-quarter mile from the bridge. The span was raised 13½ feet and then stopped.

"When the span was raised to that height, the tug proceeded slowly, believing that the span was high

*Numerals in parenthesis refer to page numbers of printed Apostles on Appeal.

enough for it to proceed through it with safety. I find that the tug had the right to assume that the span was raised high enough and that it therefore had the right to proceed.

"I do not find that the bridge was negligent by reason of the fact that a power failure prevented it from raising the span higher, but I do find that it was negligent for failing to provide an auxiliary signal, not dependent upon its power supply, so that an oncoming vessel could have been warned in the event of a power failure or other emergency which rendered it dangerous for a ship to proceed. While it is true that the span had always opened without difficulty in the past, power failures had occurred on several occasions and an ordinary prudent bridge-owner could have reasonably anticipated that a power failure could have occurred during the lifting of its movable span.

"The bridge tender's attempt to signal the oncoming tow by waving his hat, while standing on the up-river side of the bridge next to the pilot house behind some steel girders, is commendable but, in the absence of having attracted the attention of the tow personnel, does not relieve the bridge-owner of its obligation to maintain an adequate auxiliary signal, nor does it make the tow negligent for its failure to observe such hand signal. The presence of a small red reflector which was unilluminated in broad daylight in the middle of the lift span did not constitute a warning to the tow, particularly when the evidence showed that the reflector, even when illuminated, did not turn green except when the span was raised to its full height and that the span had been so raised on only a few occasions during all of its years of operation.

"Russell Towboat and Moorage Co., respondent and claimant of the Tug 'Lew Russell, Sr.', is entitled to a judgment for costs against the Libellant, and Russell Family, Inc., claimant of the Crane Barge No. 25, is entitled to a judgment on its counterclaim against libellant for its damages in the sum of \$3,306.11, and for its costs."

Bridge which raises span to permit tug and tow to pass through is presumed negligent if span insufficiently raised.

When a bridge, as in the case at bar, raises its lift span and brings it to rest to permit a tug and her tow to proceed thereunder, such is not only an invitation for the tug and her tow to pass through but also a representation (if not a signal) that the tug and her tow can proceed under the span with safety.

A case with facts identical to those in the case at bar is *The Louie Rugge* (2nd Cir., 1917), 239 F. 458, where a tug and lighter below a draw bridge blew for the bridge to open and then waited until the bridge got up before proceeding at half speed to go under the opened draw. The bridge gave no reply signal and the tug assumed the draw was raised sufficiently high when it wasn't. The mast of the lighter struck the draw. The Court held that the open draw was an invitation for the tug and lighter to proceed under and that the bridge was prima facie negligent. The Court said:

“The Libelant’s one witness as to negligence, testified in substance that he was the captain of the lighter, that he saw the bridge and its lights; that the tug blew for the bridge and waited ‘until the bridge got up . . . and then started to go ahead again’ at half speed, indicating the angle at which the bridge opened and how the mast of the lighter struck. While the appellant makes the argument from this testimony that the tug went under the bridge when it was still ascending, we think the testimony conclusively shows that the bridge had risen and had stopped before the tug proceeded, and that this amounted to an invita-

tion to the tug to come on, and prima facie shows negligence of those operating the bridge.”

See also:

The Kard (D.C.E.D. Tenn., 1940), 38 F. (2d) 844.

In the case at bar the bridge tender had actual notice twelve hours before that the tug and her tow were to pass under the bridge and that the lift span would be required to be raised (100). When the tug and tow arrived below the bridge the following occurred according to the tug “pilot”, witness SADEWASSER (228):

“Q. Now as you approached the bridge, what did you do in regard to the progress of your boat forward?

A. When we were approximately within a quarter of a mile of the bridge I stopped both engines, let them shut down until the bridge came to a stop. It started raising, and he came to a stop. I assumed that it was high enough and started the engines and proceeded at an idling speed to the bridge.”

Idling speed was between a mile and a mile and a half per hour (229). The tug and tow was bucking a five mile per hour current in the river (230). No signals were given by either the tug (89) nor the bridge (105).

Counsel for Appellant contends that *The Louie Rugge* and *The Kard* cases are not in point because in each case the vessel blew a whistle for the bridge to open. Such is an immaterial distinction. The purpose of a vessel signalling a bridge is to get the bridge open. In the case at bar the bridge tender raised the lift span without waiting for the tug to blow a whistle (288). It had previous actual notice that a crane barge required the bridge to open (100). For the tug to blow a whistle after the span

raised would have been a useless, unnecessary and abnormal act. A whistle signal from the tug was not intended as inquiry for affirmative whistle signal from the bridge for permission to pass under. This is clear from the regulation requiring the vessel to whistle and not requiring the bridge to reply (201). *The Louise Rugge* and *The Kard* cases are sharply in point with the case at bar and clearly establish that the bridge was prima facie negligent in opening the span to an insufficient height and not effectively warning the tug and her tow of the danger.

Burden of "Inevitable Accident" is upon Appellant which burden it has failed to sustain.

Appellant in answer to Appellees' cross libel pleaded the excuse that the bridge span was not sufficiently raised because of a power failure on part of a Public Utility District in the State of Washington which furnished the bridge's electric power (29). Such affirmative defense is as much as saying that the proximate cause of the damage was an "inevitable accident".

The burden of proving "inevitable accident" is heavily upon the party asserting such defense and is not to be lightly arrived at.

The Anna C. Minch (2d Cir., 1921), 271 F. 192.

The Bayonne (2nd Cir., 1914), 213 F. 216.

Palmer v. City of New York (D.C.S.D.N.Y., 1942), 43 F. Supp. 43.

In the case at bar the electric power which operated the lift span as well as the whistle on the bridge failed

when the bridge span was raised $13\frac{1}{2}$ feet, a point less than three feet short of being high enough to clear the boom on Crane Barge No. 25 (231).

There had been previous power failures on the bridge. Bridge electrician BENSON testified (136):

"Q. Well, do you know whether they had experienced any power failures before this?

"A. Not during lift operation. There have been other power failures (81).

"Q. That affected the bridge?

"A. Not during the operation of the bridge.

"Q. Well, what were those other power failures? What did they affect, the lights, or what?

"A. Power and lights both.

"Q. Well, they have had other instances than when the bridge was without any power; is that correct?

"A. That's right.

"Q. How many of those do you know of?

"A. Two times that I can remember.

"Q. How many?

"A. Two times that I can remember.

"Q. Over what period of time?

"A. Well, as soon as it was noticed by the bridge tender, he called me, and I went up.

"Q. Excuse me, I didn't mean that. I mean was it over a period of six months or a year or what?

"A. Oh, a year, I would say a year and a half."

Also, CHANDLER, Appellant's President and Engineer, testified that fuses had blown on the bridge occasionally and that, though unusual, the main source of power "does fail on occasions just like lights go out here in a thunderstorm" (206).

The amazing testimony is, however, that in spite of previous power failures, fuses blowing, etc., Appellant's

President and Engineer CHANDLER never contemplated what should be done in an emergency such as brought about this litigation. He testified (205):

“Q. Before this accident did you ever give any contemplation or thought as to what would happen if the power went out such as when this accident occurred? Did you ever reflect in your mind what should be done in such an emergency before this accident?

“A. Well, no, I never contemplated this kind of an accident. If I did, the bridge would have been designed like a battleship to take that kind of a thrust, and it wasn't.”

Prior to this collision the bridge tender had never been given any instruction as to what to do in event of power failure (109) nor was there a horn, flag or any other type of signal device whatsoever in the bridge control tower (105) except the bridge whistle, which operated directly from electric power (249).

A draw bridge over a navigable channel is every bit as much a navigable instrument as is a vessel. The operation of a bridge requires the same degree of prudence and awareness of likelihood of collision as does a ship at sea when approaching another ship. A prudent bridge operator should anticipate emergencies and make predetermined plans of action to meet such anticipated emergencies just as does a prudent deck officer on the bridge of a ship underway.

This cardinal rule requiring a watch officer to anticipate emergency was set forth by the eminent navigator and naval officer, Arthur A. Ageton in his book, *Naval Officer Guide*, at page 256. Ageton's notes to Junior

Officers standing deck watches underway open with the following:

“1. When coming on watch, *visualize the proper action to be taken* in case an enemy submarine, aircraft, torpedo, or surface ship is reported or seen, *or what you are required to do* in case of man overboard, or sighting at night a ship without lights, close aboard, or sighting a mine or suspicious object in the water, *or other emergency.*” (Italics added.)

It was not only negligence in itself for Appellant, knowing of previous power failures and knowing of the possibility of such failures occurring at critical times, not to provide means of avoiding such danger or warning vessels in such emergencies, but it also shows that the affirmative defense of “inevitable accident” cannot be satisfied as a matter of law by merely showing that the only electric power supply failed at the wrong time.

In the case of *Colonial Nav. Co. v. United States* (D.C.E.D.N.Y., 1926), 14 F. (2d) 480, a submarine was navigating upon the surface through Hell Gate and an accident occurred when “dynamic break contacts” fused and stuck together in the electrical circuit controlling the steering gear. The submarine, which had carefully inspected its electrical circuits before the maneuver, pleaded “inevitable accident” as a defense. The Court in denying such defense on the ground that the accident could have been avoided if the hand steering apparatus was used said:

“That danger from the electric steering gear was considered at least not unlikely appears from the precautions taken by the commander of the O-7, before entering Hell Gate, as appears by his testimony; but the results show that all that could be accom-

plished thereby would be to reduce the injury inflicted, not to avoid it, whereas all danger from the defective steering gear, while passing through Hell Gate and New York Harbor, could have been avoided, and the accident prevented, by using the hand steering gear or the motor instead of the engines.

“The defense of inevitable accident has not been sustained. *The Merchant Prince*, 1892, Prob. Div. 179, Asp. Mar. Cas., Vol. 7, N.S. p. 208; *The Lackawanna*, 210 F. 262, 127 C.C.A. 80; *Australia Transit Co. v. Lehigh Valley Transp. Co.* (C.C.A.), 235 F. 53; *The City of Camden* (C.C.A.), 292 F. 93; *The Edmund Moran*, 180 F. 700, 104 C.C.A. 552; *The Enterprise* (D.C.), 228 F. 131; *The J. Rich Steers*, 228 F. 319, 142 C.C.A. 611; *Hawgood & Avery Transit Co. v. Meaford Transp. Co.*, 232 F. 564, 146 C.C.A. 522. The 0-7 is solely responsible for the resulting damage.”

Even more in point is another submarine case, *The Submarine R-19, King Coal Co. v. U. S. A.* (U. S. Dist. Ct. N.D. Cal., Feb. 25, 1924), reported in 1924 A. M. C. 698, where a submarine on the surface in San Francisco Bay was unable to avoid colliding with a moored barge because a fuse blew out in the electrical circuit of the steering apparatus. In denying the defense of “inevitable accident” the Court said:

“As fuses commonly blow out, the accident could have been anticipated and avoided and was, therefore, not inevitable.”

Although the parties to *Australia Transit Co. v. Lehigh Valley Transport Co.* (6 Cir., 1916), 235 F. 53, did not raise the question of lack of emergency steering gear the Court was quick to observe it would be negligence in not having one. In that case the defense of “inevitable accident” was pleaded by one vessel in collision with an-

other because the steam steering gear became fouled. The Court in denying defense of "inevitable accident" observed at page 54:

"In addition to both these theories, it is to be observed that there was an interval of at least three minutes (The Bethlehem claims about twice as much) after it was known that the steering engine was disabled and before the collision. *It would seem that the boat might well have been provided with an alternative or emergency steering gear, which could have been put into use within much less time;* but this has not been argued as a ground of fault, and we do not depend upon it." (Italics added.)

Ordinary care required Appellant's bridge to have some form of a non-electrical signal device just as does a submarine or ship to have standby steering gear; particularly when the principal signal system was dependent upon electricity.

Collision could have been avoided if bridge had any non-electrical signal device to warn tug and her tow of danger.

Had Appellant any kind of an effective signal device in the bridge control tower to warn an approaching vessel of danger the collision could have been entirely avoided.

From a quarter mile down stream, after the bridge span had been raised and after it had come to a stop the tug and her tow proceeded against a five-mile current at idling speed—not more than one and one-half miles per hour (229). The tug's engines could be put in reverse within two or three seconds (223). The tug and her tow

was approximately 265 feet in length (232). It could have been stopped within a distance of half the tow's length (233). This means the tug and her tow could have been prevented from striking the bridge at any time before reaching a point 133 feet from the bridge span.

At the time the bridge tender and electrician first became aware of the power failure ADAMS, the bridge tender, says the tug and her tow were 600 feet from the bridge (102); BENSON, the bridge electrician, says 600 to 900 feet (125); SADEWASSER, the tug pilot, says a quarter mile or about 1500 feet (228).

Assuming nautical miles instead of land miles for arithmetical simplicity, the tug and tow approaching the bridge at one and one-half knots was advancing toward the unknown danger at the rate of 150 feet per minute. Allowing 150 feet (or one minute) for the tug and tow to stop after warning, if ADAMS' estimate of the situation is correct there was at least three minutes within which the bridge could warn the tug and her tow of the danger; if BENSON is right there was five minutes; and if SADEWASSER is right there was nine minutes.

Respondent's witness STACKHOUSE, Supervisor of Bridges and Ferries for Multnomah County, Oregon, testified that the four draw bridges in Multnomah County had whistles operated by compressed air pumped into a storage tank by electrical means which enabled the whistles to operate even with a power failure (219). He also testified that the bridges under his supervision frequently experienced power failures (224). He further testified that the bridges in Multnomah County all had in addition to air whistles a loud speaker box or horn not dependent

upon electrical power which could be used in emergencies to talk to approaching vessels (224). This witness expressed his opinion that the air whistles as used on the Multnomah County bridges were of the type customarily used upon bridges on the Columbia river (220).

From the foregoing it becomes crystal clear that Appellant was negligent and that it utterly failed to sustain its affirmative defense of "inevitable accident". Previous to this collision it knew of power failures; knew of no signalling devices whatsoever being in the bridge control tower, except an electrically driven whistle; made no move whatsoever to anticipate what would happen in event of a power failure during the raising of the span; and made no attempt to provide any kind of an auxiliary signal system to warn off an approaching vessel in an emergency, such as confronted it in the case at bar.

Appellant must have known, and if not, could have easily ascertained how other draw bridges in the region handled this problem. The fact that other bridges have anticipated power failures and have provided non-electrical auxiliary devices to signal vessels even with air whistles not geared to the electricity merely emphasizes the negligence and indifference of Appellant to marine disaster. It was negligence to leave bridge tender ADAMS with no means of meeting the emergency, but to go to the upstream edge of the control tower and frantically wave his hat through bridge obstructions in a vain and ineffective attempt to warn off a tug and her tow approaching from the downstream side of the bridge.

It is equally clear that Appellant has failed to sustain its burden of proving its affirmative defense of "inevit-

able accident", a terrific burden at best, when it is apparent that the accident was one that could have easily been avoided by anticipating an ordinary occurrence. Knowledge of likelihood of power failure should be chargeable to anyone using electric power brought in over wires from a distance. It is particularly chargeable to Appellant, which had power failures on the bridge previous to the instant accident.

**Decisions cited by Appellant
in its brief either support
Appellees or are not in
point with the case at bar.**

These Appellees feel compelled to distinguish several decisions cited by Appellant in support of its position, that the bridge was free from negligence. It also contends that several of the decisions cited by Appellant really support Appellee's contention.

On page 17 of its brief Appellant cites *Newton Creek Towing Co. v. City of New York*, 49 F. (2d) 475, which held that a bridge was not negligent in failing to anticipate that a "key" on a shaft which turned gears that raised the bridge span would break. The significant fact in that case was that it was a libel by an excursion steamer which lost business because it could not go through the bridge while same was being repaired. It was not a libel where a vessel, attempting to pass under the bridge at the time of the accident, could not or did not get a signal of danger. Of course, a bridge cannot anticipate that a piece of its machinery might without cause break. However, a bridge can very well anticipate that a power failure

might occur during the lifting of a span and while not being able to do anything about it, at least make provision to warn a vessel approaching such unknown danger. That case is nowise in point.

The case of *Cement v. Metropolitan West Side El. Ry. Co.*, 123 F. 271, which at page 18 of its brief Appellant asks this Court NOT to follow is truly a case in point with the one at bar. It should be followed and Appellees appreciate Appellant calling it to Appellees' attention. That is a case where, as a vessel approached a bridge, for some unexplained reason the bridge tender could not open the bridge. The Court in holding the bridge negligent in not providing a method of warning the approaching vessel of the danger, said at page 274:

"And again, when the bridge tender found that the bridge would not open—and that was when the vessel was 150 feet north of Jackson street bridge and at least 300 feet away—in view of the situation we think it was the duty of the respondent to provide, and of the bridge tender to give, some sort of warning signal that would timely notify the vessel of the difficulty and of the danger that was imminent, of which she could not otherwise be informed."

In this last cited case the vessel had signalled for the bridge to open and was approaching in anticipation of its opening. In the case at bar the bridge had already opened, but not high enough, and the tug and barge being invited to pass under did so without being warned of the danger which the bridge tender knew and the tug master did not.

The case of *City of Chicago v. Wisconsin S.S. Co.*, 97 F. 107, was cited by Appellant at page 18 of its brief,

claiming it to be in point with the case at bar. It isn't. That was a case where a steamship passed through a turn bridge—the center span having been opened and held in the open position by a lock at one end fastened to the center protection structure of the bridge. The Court found that a fender or some obstruction on the forward part of the steamship struck the opened turn span at one end, breaking the lock that held the span in place and causing the after end of the turn span to strike the same steamship near her stern. The Court held that the bridge was not negligent because the object of the lock was to hold the span in place, not to have it withstand collision by the vessel passing through. The Court said, at page 110:

“The object of the lock is merely to hold the bridge in position over the center protection, and not to resist the impact of a moving vessel.”

Such situation is radically different from the case at bar, where these appellees contend that Appellant should anticipate power failures and provide for warning vessels in event of power failures—not asking that a piece of machinery designed for one purpose be expected to be responsible for quite another.

Another case requiring comment is that of *Conners Marine Co. v. New York and Long Branch R. Co.*, 87 F. Supp. 132, cited by Appellant for the proposition that when a vessel strikes a draw bridge it is presumed that the vessel is negligent. Of course, when a vessel strikes an immovable abutment of a draw bridge the vessel is presumed to be negligent as obviously the abutment can't move. It is not the case of a vessel striking an insuf-

ficiently raised span of a draw bridge. The most significant thing in that case is that after the Court found the tug and her tow negligent due to faulty navigation which caused it to collide with the abutment and not the span of the draw bridge it went on to find the bridge negligent in delaying to raise the span and in not warning the tug and tow of inability to promptly open its span. The Court said at page 135:

“The failure to signal and the delay in opening the draw resulted in placing the tug in a dangerous position. Thus, having created a situation in which there was the risk of collision, the negligence of the bridge personnel must be held to have concurred with the imprudent navigation of the tug in causing the collision.”

Nor is *Texas & P. Ry. Co. v. Angola Transfer Co.*, 18 F. (2d) 18, analogous to the case at bar. In that case a pier of the bridge which was known to the vessel passing through the bridge, was submerged during an abnormal high water and the vessel struck a sharp edge of the pier causing the damage. The Court absolved the bridge of negligence in saying it was not required to anticipate the high water that submerged the pier nor to put a fender on the pier to prevent its sharp edge from damaging a vessel that had no occasion to strike the pier in the first place.

CONCLUSION

The record supports the finding that Appellee RUSSELL FAMILY, INC. was damaged to extent of cost of repair and loss of use to CRANE BARGE NO. 25 (273-274). The items of damage were not disputed at time of trial and is not now questioned by Appellant on appeal.

In view of the present record the evidence supports the findings of the trial court and the findings with appropriate law support the judgment requiring Appellant to pay to Appellee RUSSELL FAMILY, INC. \$3,306.11 for damage resulting to Crane Barge No. 25 by negligence of Appellant in

(1) Raising the bridge span to an insufficient height and inviting the tug with her tow to go through without any warning of danger which the bridge tender knew and the tug did not know;

(2) Failure by Appellant to meet its burden of proving that the damage sustained by Crane Barge No. 25 resulted from an "inevitable accident";

(3) Knowing of previous power failures; that the only warning device on the bridge was an electrically controlled whistle; and failing to act as a prudent bridge operator should act by either having a whistle that was not dependant upon power or having some other non-electrical auxiliary device to warn an approaching vessel of danger created by a power failure.

WHEREFORE these Appellees pray that the judgment of the lower court be affirmed and that Appellee **RUSSELL FAMILY, INC.** upon its cross libel in personam against Appellant recover \$3,306.11 damages together with costs and interest from date of judgment.

Respectfully submitted,

THOMAS J. WHITE,

WILLIAM F. WHITE,

Proctors for Appellees

CRANE BARGE No. 25 and her
owner **RUSSELL FAMILY, INC.**

United States
COURT OF APPEALS
for the Ninth Circuit

OREGON-WASHINGTON BRIDGE COMPANY,
Appellant,

vs.

TUG "LEW RUSSELL, SR.", and CRANE BARGE
NO. 25, RUSSELL FAMILY, INC., RUSSELL
TOWBOAT AND MOORAGE COMPANY,
Appellees.

**BRIEF OF APPELLEE, RUSSELL TOWBOAT
AND MOORAGE COMPANY, AS RESPONDENT
IN PERSONAM AND CLAIMANT OF TUG
"LEW RUSSELL, SR."**

Upon Appeal from the District Court of the United
States for the District of Oregon.

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"LEW RUSSELL, SR."**

Upon Appeal from the District Court of the United
States for the District of Oregon.

STATEMENT

The Opinion and Findings of Fact of the Trial Judge,
Honorable Gus J. Solomon, leave little more to be said.
They amply support his conclusion that the Tug "Lew
Russell, Sr." and her owner, Russell Towboat and Moor-

age Company, were in no way liable for the damage to the Bridge.

That is enough to satisfy this appellee. This appellee is not seeking damages from the Bridge; consequently, it is immaterial to this appellee whether the Bridge was to blame or not. We think it clearly was, and that its fault was the proximate and real cause of the accident. This was held by the Court, and is ably demonstrated by proctors for Russell Family, Inc., owners of Crane Barge No. 25, whose brief on that point we adopt. But we really are not so much concerned with that. What we are concerned with is to show that the claim of the Bridge against this appellee for damages to the Bridge is unfounded; for the reason that the Tug "Lew Russell, Sr." was without fault. And as we have said, the Opinion and Findings of the Trial Court, amply supported by the evidence, demonstrate this clearly and relieve us from extended argument.

THE FACTS

There is no material disagreement about the facts. The White Salmon-Hood River Bridge across the Columbia River is high enough above the water to permit the passage of most river craft without lifting the draw span. If, however, some craft high enough to require lifting of the draw desires to go through the Bridge, it is the practice or regulation to give the Bridge twelve hours' advance notice so that the bridge tender (Mr.

Adams) can be on hand to lift the span at the expected time. And because the draw span is electrically operated, it was the practice for Mr. Adams to be accompanied by an electrician from shore,—in this case Mr. Benson. The electrical current is furnished from the shore by a public utility district of the State of Washington.

On this particular occasion—June 13th, 1950—the Tug "Lew Russell, Sr.", with Crane Barge No. 25 in tow approached the Bridge from the down-river side. The tug and tow had departed from Vancouver, Washington, and had given the required twelve hours' advance notice that it would be approaching the Bridge in the morning and would require the span to be lifted. Consequently, Mr. Adams, the bridge tender, and Mr. Benson, the electrician, were on the Bridge awaiting the tug and tow and ready to lift the span for their passage. The tug and tow arrived below the Bridge at about 11:30 A.M. and when about a quarter of a mile from the Bridge, the tug stopped her engines and proceeded to drift, and at the same time Mr. Adams, the bridge tender, recognizing that this was the tug and tow of which notice had been given, without waiting for any signal, raised the draw span of the Bridge $13\frac{1}{2}$ feet—that is, $13\frac{1}{2}$ feet above the deck of the bridge, its ordinary position. At this point the electric power failed; consequently no further lifting was possible, nor could a warning blast or whistle be given because the whistle was operated by the same electrical current which had failed.

The U. S. Engineers' Regulations do not require the Bridge to give any signal at all inviting the approaching craft to come on. The pilot of the tug, therefore, seeing that the span was well lifted and had come to a stop, judged that the Bridge was ready for him to pass through. The Trial Judge has found on all the evidence that he was rightly justified in this assumption, and we think the evidence, as well as the legal authorities which we shall cite, clearly show that he was. He therefore started up his engines and proceeded slowly toward the Bridge at a speed of about $1\frac{1}{2}$ miles per hour. It appeared to him (and to his co-pilot, who, though not on duty, was watching) that there was sufficient clearance to go through, until he got within a few feet of the Bridge, when he saw that the tip of the whirly crane, which was on Barge No. 25, was going to hit the span. (It failed to clear by only 2 or 3 feet.) The pilot thereupon reversed his engines, but too late to avoid the contact and the tip of the boom rode up over the railing of the draw span a ways and was later pulled free. A photograph taken very shortly after, and introduced in evidence by the libelant, shows the tug and tow lying in the river just below the bridge and the general position of the crane in relation to the Bridge.

ARGUMENT

I.

The "First Point" in appellant's brief is that this is a trial de novo. That is so well understood and the rule

so well settled that the Trial Court's Findings of Fact, when supported by evidence, will not be disturbed, that we do not discuss it.

II.

The "Second Point" is that the lack of an auxiliary whistle or an emergency whistle on the Bridge did not contribute to the accident and the damages complained of.

This has been ably answered by proctors for Crane Barge No. 25 and does not concern us, except that we think it is apparent that the lack of the auxiliary whistle or other emergency whistle was, as the Court found, the real and proximate cause of the accident, and this is a cumulative reason, in addition to the lack of any negligence on the part of the tug, why the tug should not be held liable. But on this point of the auxiliary whistle or emergency whistle, we adopt the argument of proctors for Crane Barge No. 25 and say no more about it.

III.

Appellant's "Point Three" is that appellees are not in a position to "rely on the proposition that in the absence of proper warning a vessel approaching a bridge over navigable waters has the right to assume that the bridge will be timely opened for traffic."

The proposition on which we rely is supported both by reason and authority. An often-quoted case is *Clement v. Metropolitan West Side Electric Railway Company*, 123 F. 271 (7 C.C.A., 1903). In this case a

steamer, having signaled for the opening of the Metropolitan Bridge across the Chicago River in the nighttime, proceeded toward the bridge in expectation that it would open, but through some mechanical failure the bridge did not open and the steamer collided with it. There was a red signal light or lights on the bridge, but "no signal or warning to the approaching boat was given with respect to the difficulty, *otherwise than by the red signal light or lights upon the bridge*". (The Court's statement of the facts at page 272.) The Court, after stating the facts, then said:

"A bridge spanning a navigable river is an obstruction to navigation tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to the effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been

swung or raised and locked, and to critically examine the situation before proceeding (*City of Chicago v. Mullen*, 54 C.C.A. 94, 116 Fed. 292), but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened (*Manistee Lumber Company v. City of Chicago* (D.C.) 44 Fed. 87; *Central Railroad Company of New Jersey v. Pennsylvania Railroad Company*, 8 C.C.A. 86, 59 Fed. 192), when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern."

This holding has been quoted with approval or substantially paraphrased in the following cases:

The Bellatrix, 114 F. 2d 1004, 1006 (3 C.C.A., 1940);

The Russel No. 16, 25 F. Supp. 1013, 1017 (S.D. N.Y., 1938);

The Majestic, 80 F. 2d 879, 890 (4 C.C.A., 1936);

Newton Creek Towing Co. v. City of New York, 47 F. 2d 883;

The Kard, 38 F. 2d 844, 847 (E.D. Pa., 1930);

The Louise Rugge, 234 F. 768, 771 (D. N.J., 1916);

O'Keefe v. Staples Coal Co., 201 F. 135, 143 (D. Mass., 1911).

In *The Louise Rugge*, *supra*, the mast of a lighter in tow of a tug collided with the draw span of a bridge. The Court said:

"Moreover, as the draw span had stopped in its rise before the tug and tow proceeded, the captain

of the tug was justified by reason of that fact, as well as by his observation of the light on the draw, in proceeding. It is not the duty of the captain of a tug in charge of a tow, in passing up a river across which there are a number of bridges, to examine every draw to see that the same has been fully and sufficiently operated by those whose duty it is to operate the same. In *City of Chicago v. Mullen et al.*, 116 Fed. 292, 54 C. C. A. 94, it is suggested by Judge Jenkins, in delivering the opinion of the Court of Appeals of the Seventh Circuit, that common sense does not demand—

‘that vessels navigating the river shall heave to at each of the numerous bridges that span the river, and critically examine whether the bridge has been swung and whether it has been locked.’

“Nor is it required to delay proceeding until it receive some special signal from those in charge of the bridge to proceed. The usual customary signal is all that is required; and, if the only signal to proceed is the raising of the draw, the captain of the tug cannot be deemed negligent if he proceeded, although those in charge of the draw be required by law to give some other signal. . . .” pp. 770-771.

In *The Kard*, supra, the derrick barge Leo in tow of the tug Kard collided with a bridge, as in this case. The derrick boom rose seventy feet from the deck. The draw of the bridge was of the jack-knife type, capable of being raised to an angle of eighty-four degrees. The Kard signaled the bridge to open. The bridge tender gave no signal in response, but raised the draw only fifty degrees from the horizontal, instead of the maximum eighty-five. “The master of the Kard, seeing that the bridge was being raised, proceeded to enter the draw, whereupon the boom of the Leo was brought into collision with the

raised draw-span, and, as a result, the derrick was broken, the 'A' frame was knocked down, the house was crushed, and the barge otherwise damaged". pp. 845-6. If the span had been raised to eighty-five degrees there would have been no collision.

The Court, after quoting *Clement v. Metropolitan West Side Electric Railway Company*, supra, then said:

"The act of raising the draw-span, after the Kard had given the statutory signal, was an invitation for the tug with her tow to come on through the span, assuming that her safe passage had been given, . . . (citing *The Louise Rugge*)." p. 847.

In *The Majestic*, supra, a tug and tow collided with a bridge. The facts are stated by the Court as follows:

"When the vessels were about 2,000 feet from the bridge, the master of the tug, admonished by a sign located nearby on the side of the canal, gave a three-blast signal, indicating that he desired to pass through the draw. At that time a red light was showing on the bridge. There was no response to the signal, the bridge did not open, and the red light remained fixed. About this time, the tug stopped her engines and drifted with the tide at a speed of one and a half to three miles per hour for a distance of 200 feet, when a second three-blast signal was sounded. A signal of one blast was then sounded by the bridge tender, which was the usual notice to pedestrians that the lift span would be raised in not less than one minute. As the master of the tug had taken her through the canal 287 times in three years and a half, he doubtless understood the meaning of this signal. The draw of the bridge rises at the rate of one foot a second, and an elevation of seven feet would have cleared the vessels. On this occasion, however, the bridge was

frozen, and the bridge tender was unable to raise it until after the collision had taken place; but he gave no notice of this difficulty until the flotilla was too close to be stopped. Then he sounded a danger signal of two blasts and called out that he could not raise the draw; but it was too late and the barge, being deeply loaded, drifted ahead of the tug into contact with the bridge.

"It would have been practicable for the tug when within 1,000 feet of the bridge, to have held the barge in check against the tide until the green light on the bridge appeared; but the master of the tug did not consider that there was any danger because he had received no notice from the bridge to stop and many times before his vessel had gotten close to the draw before it was raised. Even when the danger signal was given by the bridge tender, there would have been time to have raised the bridge for the safe passage of the vessels if it had been in good order." P. 880.

The Court, after quoting *Clement v. Metropolitan*, supra, and citing many other cases, held the bridge negligent and absolved the tug, even though the red danger signal light was showing from the bridge. On that point the Court said:

"It is insisted, however, that the master of the tug was negligent in proceeding in face of the red light displayed upon the bridge after he had signaled for the opening. This light, under the rules, was to be displayed at night to indicate that the draw was closed, and it served this purpose as the tug approached the bridge in the darkness of the December morning. But it did not signify that the draw would not open in due time in response to the opening signal. On the contrary, the sounding of one blast by the bridge to warn vehicular traffic indicated to the master of the tug that the bridge

tender had been aroused and intended to open the draw promptly. We think that under these circumstances the master was justified in assuming that the draw would be opened in time for safe passage, as had been the case on many similar occasions in the past. As the cited cases show, the master of a vessel, having duly signaled for the draw may properly proceed at slow speed on the assumption that the bridge will open, until it appears by proper warning or reasonable view of the situation that it will not. See *Clement v. Metropolitan West Side El. R. Co.*, *Monroe v. City of Chicago* and *Conklin v. City of Norwalk*, *supra*. Affirmed." pp. 881-2.

But counsel insist that these cases are not applicable because in them the tug had given a signal to the draw-bridge to open, whereas in our case no such signal was given.

"The law does not require the doing of a vain thing."

When the tug "Lew Russell, Sr." and her tow came to a virtual stop a quarter of a mile below the Bridge, and Adams, the bridge tender, recognized them as the tug and tow of which he had been notified, and for which he was waiting, and proceeded to raise the draw without waiting for a signal from the tug, the situation was exactly the same as if a signal had been given. The tug and tow were there, Adams knew they wanted to come through. Without waiting for any signal from the tug, he raised the draw and invited the tug to come on. The blowing of the signal by the tug then would have been a vain thing. As the Trial Court properly held, the failure to blow it was entirely immaterial.

But, counsel says, the tug did not wait for any "affirmative sign" from the Bridge that it was not in readiness to permit the passage of the tug and tow. It is a sufficient answer to this that the U. S. Engineers' official regulations governing this Bridge did not require any "affirmative sign." Navigators are entitled to govern themselves according to the official regulations. They did so here. It is true there was some testimony on behalf of the Bridge that though no regulation required it, it was the "practice" of the Bridge, on receiving a signal from a tug desiring passage, to blow an answering whistle signifying assent. But the testimony on behalf of the tug was that its navigators and owners, in going through the Bridge on previous occasions, had never heard any such answering whistle and knew of no such practice. And it was admitted by libelant's own witness Benson that, so far as he knew, no notice had ever been given to Russell Towboat and Moorage Company of the alleged practice.

Counsel also somewhat weakly suggests that the tug was not "proceeding prudently." It is hard to know what counsel can mean by this. The tug had come to a practical stop, and then when the draw was open, proceeded slowly and under perfect control at a speed of one and one-half miles per hour. Nothing more need be said on this.

IV.

Appellant's "Point Four" is that the tug should have had a lookout.

It is a sufficient answer to this that none of the cases whose opinions we have quoted even mentions the necessity for a lookout. On the contrary, they all proceed on the premise that it is up to the bridge tender to lift his span in time, and sufficiently high enough, for the approaching vessel to pass; and he is the sole judge of *when* to lift, how *high* to lift it and whether to lift it still *higher*. He is the man most nearly *on a level* with the top of the approaching tug and tow and therefor able to judge the clearance and is in complete control of the machinery. As said in *The Louise Rugge*, 234 Fed. 768, at page 770:

“It is not the duty of the captain of a tug in charge of a tow, in passing up a river across which there are a number of bridges, to examine every draw to see that the same has been fully and efficiently operated by those whose duty it is to operate the same.”

In some of the cases cited, the span was not even lifted at all. In others it was not lifted high enough. But in all cases it was held that the tug was justified in approaching in the expectation that it would lift in time. So here. If, as the tug approached, it seemed as if additional clearance might be necessary, that would be up to the bridge tender, and the tug would, in the absence of some danger signal or warning, be justified in proceeding ahead in the expectation that the span would be lifted higher. The authorities cited so hold.

As the Trial Court said in his oral opinion:

“I find that the tug had the right to assume that the span was raised high enough, and that it therefore had the right to proceed.”

We believe the foregoing is a complete answer to counsel's contention. But we observe further that if a lookout had been stationed, as he suggests, on the forward end of the Crane Barge, such lookout would have been directly underneath the top of the boom looking vertically upwards at it, and we think in about the worst position possible to get any "sight" which would have enabled him to tell whether it would pass through the bridge or not. Neither will it escape the Court's attention that the day was bright and clear; the navigation was in a smooth river; and the pilot of the tug could see plainly everything ahead of him,—the bridge, the lifted draw span, Crane Barge 25, and the whole of its derrick boom including the top.

The attempt of the bridge tender Adams to wave his hat at the tug after the power failure we dismiss as hardly worthy of notice. He was admittedly on the East, or upstream, side of the Bridge, with the steel structure of the Bridge intervening between him and the tug, and as he himself testified,—“There was some bridge members there that it was pretty hard or impossible to see me.” Ap. 83. As the Trial Court said in his opinion, this attempt of the bridge tender, while commendable, did not relieve the Bridge from liability for its failure to maintain some adequate auxiliary signal, nor did it make the tug ~~tow~~ negligent for its failure to observe such hand signal. Ap. 41.

CONCLUSION

We submit that the Bridge was at fault for failure to provide some auxiliary whistle in event of a power failure; that the tug was without fault; and that the decree should be affirmed.

Respectfully submitted,

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Portland 4, Oregon,

Of Proctors for Appellees, Russell
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Respondent in Personam and
Claimant of Tug "Lew Russell,
Sr."

United States
COURT OF APPEALS
for the Ninth Circuit

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vs.

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NO. 25, RUSSELL FAMILY, INC., RUSSELL
TOWBOAT AND MOORAGE COMPANY,
Appellees.

REPLY
BRIEF OF APPELLANT
OREGON-WASHINGTON BRIDGE COMPANY,
a Corporation.

Upon Appeal from the District Court of the United
States for the District of Oregon.

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DEC 13 1951

PAUL P. O'BRIEN

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INTRODUCTION

When we keep in mind the close tie-in between Russell Towboat and Moorage Company and Russell Family, Inc., as shown by the testimony of Lew Russell, Jr. (Ap. 275) who said he is President and Manager of Rus-

sell Towboat and Moorage Company and Secretary and Manager of Russell Family, Inc., we are not surprised to find both of these organizations attempting to spell out some acceptable theory to sustain the judgment of the Trial Court and to place the responsibility for the accident out of which this claim arose upon appellant. Notwithstanding this concerted effort, we find very little in the briefs filed on behalf of appellees which necessitates answer and nothing which sustains or justifies the conclusion reached by the Trial Court.

We again point out that the only possible fact found by the Trial Court which can in any way subject appellant to criticism is that appellant had no auxiliary or emergency flag or whistle to use in the event of a power failure. We again remind this Court that the Trial Court was not justified in its conclusion of law that appellant failed to exercise due diligence in this respect. We likewise reiterate that the evidence is clear that no auxiliary equipment reasonably suggested by any of the evidence in the case could have been used effectively or would have been observed or comprehended by appellees, or their agents. It must be remembered that even the Trial Court did not conclude that appellant should have both an auxiliary whistle and an emergency signalling device. The Trial Court merely concluded that appellant should have one or the other.

As we pointed out in our opening brief, whistles had been uniformly blown when equipment went through the raised draw span. All of those who testified on behalf of appellees who had gone through the bridge when

the span was lifted testified that they had never heard any whistle blown. In the face of this testimony, how can it be contended that an emergency whistling device could have prevented the accident? If a flag had been provided it is obvious that it would have been of no avail. When the operator of the tug had his eyes so fixedly glued on the top of the boom and directed toward the center of the lift span, necessarily he would not have seen a flag waved from the control tower at the north end of the span. The evidence is clear that the bridge tender, Mr. Adams, could not have reached the center of the lift span between the time the power failed and the moment of impact. It is obvious that a flag would not have been as readily accessible as was Mr. Adams' hat. The flag necessarily would have been placed or stored somewhere about the bridge. It would not have been on Mr. Adams' person as was his hat. Whatever time it took him to go to and obtain the flag, wherever located, would have been deducted from the time available for him to give the signal.

We fail to see anything in the record which would justify a conclusion that a reasonably prudent operator of a bridge constructed and located as is the one in question should have an emergency whistle or an auxiliary flag or signal. The record is conclusive that no flag or signal or whistle could have stopped the operator of the tug and tow. The record conclusively shows that the lack of flag or auxiliary whistle was in no way proximately connected with the accident or the damage sustained.

POINT I

Appellees must establish two important factors before they can rely upon the proposition that in the absence of proper warning a vessel approaching a bridge over navigable waters has the right to assume that the bridge will be timely opened for traffic:

(a) Such vessel must have given proper signal to open the bridge;

(b) Such vessel must prudently proceed under slow speed. Inasmuch as the regulation in effect at the time the collision occurred out of which this claim arises expressly required the vessel to give a whistle signal before proceeding through the draw, the operator of the tug had no right to presume that the draw was raised for his passage until after he had given the signal required by regulation. It may be true as argued by proctors for appellees that insofar as the operator of the bridge was concerned, no different procedure would have been followed had the whistle signal required by regulation been given. This does not answer the question. Appellees were charged with knowledge that the bridge regulations required appellant to raise the draw at frequent intervals for the purpose of testing its operation. For all the tug operator knew at the time he chose to assume that the bridge had been raised for his passage, appellant was not intending to let him through and did not raise the span for his use, but merely raised it for test purposes. If he had given the signal required by regulation, and thereafter the bridge had been raised and come to a stop,

he might then justify his contention that such stoppage was an invitation to proceed; that he had the right to assume that the bridge was ready for his use, and in the absence of such readiness a presumption might arise that appellant was negligent. No such assumption, no such presumption and no such result follows when the necessary precedent signal had not been given.

Even in the *Louise Rugge*, 234 F. 768, which is about the most favorable case anyone has been able to find in support of appellees' contention, the ruling of the court is based on the proposition that the tug and lighter below a draw bridge blew for the bridge to open and then waited until the bridge got up before proceeding at half speed to go under the opened draw. This premise is set out in the language appearing at p. 4 of Brief of Appellee, *Russell Family, Inc.* It should also be noted in the *Louise Rugge* case that the vessel was proceeding through bridges on the Passaic River. Apparently these bridges were very numerous and closely spaced.

This court will take judicial notice that the Hood River-White Salmon Bridge is in an isolated spot on the Columbia River and that there is no other bridge within twenty river miles thereof. It certainly cannot be contended that the tug and tow were being operated prudently or were prudently proceeding when they had no one on lookout, when the operator was knowingly in a poor position accurately to determine whether or not the top of the boom on the derrick barge would go under the raised span and when he did not see fit to station a lookout at some more favorable spot.

We note with interest the mathematics used by counsel for appellee, Russell Family, Inc. on p. 12 of its brief, where it is stated that the tug and her tow could have been prevented from striking the bridge at any time before reaching a point 133 feet from the bridge span. As we pointed out in our opening brief, the record shows the forward end of the tow was some 200 feet ahead of the point occupied by the operator, and we again repeat that a lookout so stationed would be in a much more favorable position to make observation and give warning than was the operator.

It is interesting to note that while proctors for Russell Towboat and Moorage Company throughout the trial persistently pointed out the very exceedingly difficult angle from which the tug operator judged the relative height of the end of the boom and the lift span, on p. 14 of the brief filed by said appellee, we find its counsel taking an almost diametrically opposed position and saying that " * * * the pilot of the tug could see plainly everything ahead of him * * * ." Unfortunately counsel for appellee is forced to take one or the other horn of the dilemma. If the pilot of the tug could see as it is now contended in appellee's brief, then he is guilty of negligence for blindly running down upon the bridge under the circumstances. If he could not see as was contended by counsel at the trial, he was equally negligent and imprudent in proceeding into a position from which he could not extricate himself before determining whether or not the boom which extended in the air some 100 feet would clear the bridge.

It is further interesting to note that counsel for appellee, Russell Towboat and Moorage Company, insists on putting its lookout in the most unsatisfactory place possible. He says such lookout on the forward end of the crane barge would have been directly underneath the top of the boom. The record shows (Ap. 276) that the crane barge had a beam of approximately 34 feet. The pictures of the equipment which are in evidence show that the boom was a comparatively narrow member. We are justified in assuming that a lookout could have been some 15 or more feet to one side from the boom if such position would have given him a better opportunity to observe and to perform the functions of a proper lookout. If one lookout was not sufficient under the circumstances, then the tug should have had more than one lookout and should have had that lookout in the most advantageous spot possible to perform the essential functions of a lookout.

We hope we have not labored this point too much, but apparently we did not make our position clear in our opening brief inasmuch as counsel for appellee, Russell Towboat and Moorage Company, has said on p. 12 of its brief that we somewhat weakly suggest that the tug was not proceeding prudently. In the light of the facts disclosed by the evidence that without giving any signal and therefore, without having any right to assume that the bridge was opening for its passage, appellees' equipment bore down upon the defenseless bridge with the boom on the crane barge some 110 feet long extended upward like a lance aimed at the shield of an opponent, with the pilot in a place from which it was admittedly

most difficult for him to judge the height of the bridge in relation to the end of said boom, with no lookout at a place of vantage and with equipment extending forward at least 200 feet and with an alleged ability to stop at a distance not to exceed 133 feet, continuing forward in the face of a five mile current at a speed estimated by appellees' own witnesses at approximately one and one-half miles per hour and not discovering the imminent impact until within some 10 to 15 feet of the bridge span. All of this seems to us like gross negligence, reckless disregard for the right of others, a hap-hazard, devil-may-care attitude, most extremely removed from prudence or care or caution. We hope we have not weakly suggested that the equipment was not proceeding prudently. If we knew how to say more forcefully and effectively that the tug was not proceeding prudently we would do so.

POINT II

What might constitute due diligence at Hood River would not necessarily be due diligence in Portland, Multnomah County, Oregon.

Appellee, Russell Family, Inc., has tried to obtain some comfort from the testimony of the witness, Edward E. Stackhouse. His testimony very definitely shows the difference between the Willamette River in Portland and the Columbia River at the Hood River-White Salmon Bridge. He testified (Ap. 21) that (in Portland) the boat gives a signal, the bridge answers that signal and when the answer has been given, the boat then has the all-clear. In other words the vessels which go through

the bridges in Portland, according to the testimony of Stackhouse, are required to give a signal and to wait for an answering signal from the bridge before they are entitled to approach the bridge and assume that the bridge will be opened. In answer to the Court's question (Ap. 225) witness Stackhouse said that the signals to on-coming traffic were given by reason of regulations of the War Department. Inasmuch as the witness Stackhouse was willing to testify that it was customary to have the type of whistles he described on bridges in Multnomah County on the bridges on the Columbia River (Ap. 220) and he later admitted that he had never worked on any bridges in the Columbia River and didn't know what kind of equipment they had (Ap. 223-224), we are somewhat dubious as to the value of his testimony. However, if we give it face value, it very definitely shows that the War Department considered different regulations necessary in the Portland Harbor from those at Hood River on the Columbia River, because if we accept Stackhouse's testimony, every vessel was required to give a signal and the bridge an answering signal before it proceeded (Ap. 221) through the bridges in Portland, whereas, at the Hood River-White Salmon Bridge, the government regulation did not require the bridge to give an answering signal.

The record shows, however, that out of abundance of caution and in excess of the minimum requirements set down by the federal authorities, a whistle had universally been blown when the bridge was in readiness for the vessel to proceed after the draw had been raised in the Hood River-White Salmon Bridge.

There is another significant factor in Stackhouse's testimony. In answer to the question, "Have you had power failures on the bridges?" he answered, "Oh, yes, we have those quite frequently" (Ap. 224). If, as a matter of fact, there were power failures quite frequently in the Portland area this may explain the requirement of the federal government that the bridge give an answering whistle before a vessel may proceed through the Portland bridges, whereas, it did not make such requirement at Hood River when the record shows that only on two occasions had there been a power failure which involved the Hood River-White Salmon Bridge. The frequency of power failures in Portland, the infrequency of power failures at Hood River, very likely explains the difference in the regulations, both of which were enacted by the War Department under Congressional authority.

However, the record does show that it had become standard practice to blow the whistle twice—two short whistles—before river traffic started to go through the Hood River-White Salmon Bridge after the span was raised (Ap. 192, 200, 211, 212, 285).

The pertinent part of the Bridge Regulations in effect at the time the accident occurred were admitted in evidence as libellant's exhibit No. 16. Appellees offered in evidence as respondents' No. 4, a document claimed to be the present regulations of the U.S. Corps of Engineers relating to the Hood River-White Salmon Bridge. It was pointed out by Mr. Chandler (Ap. 202) under these regulations the burden is definitely placed on the ship to wait for an affirmative signal from the bridge before it

may go through the span when it is lifted. Under the present regulations the vessel dare not approach the bridge unless it receives a green flag by day, or a green light at night. In other words, the War Department has shown it recognizes that the rule applied in the many cases cited by appellees will not work in the Columbia River at Hood River and it has made its new regulations in recognition of this fact. Vessels can only go through the bridge when signalled to do so.

As distinguished from the situation in the *Louise Rugge*, 234 F. 768, where there were many bridges and where it was deemed improper for the vessel operator to be required to satisfy himself that the signal given by him had been received and understood and therefore the burden put on the bridge operator to get the draw out of the way at his peril, in our case under present regulations, the War Department puts the burden on the ship operator and requires said operator to await an affirmative signal from the bridge before the vessel can approach the bridge when it is necessary to raise the lift span.

As pointed out by Mr. Chandler, when the power is off the whistle is of no effect. We assume the Court will take judicial notice of the fact that the Hood River-White Salmon Bridge is located at a point on the Columbia River where the wind blows rather strongly; sometimes up the gorge; other times down the gorge. On the day of the accident it was pointed out that the wind was blowing up-river. This is another reason why a whistle is not a particularly effective mode of signalling at the Hood River-White Salmon Bridge (Ap. 287).

On p. 5 of the brief of appellee, Russell Towboat and Moorage Company, it is said the proposition that, in the absence of proper warning, a vessel approaching a bridge over navigable waters has the right to assume that the bridge will be timely opened for traffic is supported both by reason and authority.

It is correctly stated that *Clement v. Metropolitan West Side Electric Company*, 123 F. 271, is an oft quoted case. This case shows there are two conditions precedent before the proposition becomes valid: (1) The approaching vessel must have given a proper signal; (2) It must be prudently proceeding under slow speed.

Neither of these conditions were met by the tug operator. It is admitted he gave no signal. Though it may be argued that this made no difference in the activities of appellant's employees, we have already pointed out that in the absence of the signal required by regulation, the tug operator had no right to assume that the draw was being lifted for him to proceed rather than for test purposes as required by regulation. The tug certainly was not proceeding prudently with no one on watch and with the tug operator in a position from which he admittedly could not make accurate observations. It is therefore clear that appellee has not brought itself within the rule as stated in the authorities.

Insofar as reason is applied to this particular case the considered judgment of the responsible federal agency for all bridges over navigable waters has not permitted the vessel operator to assume that the bridge will be opened for traffic. In making the current regulations for

the Hood River-White Salmon Bridge the War Department has reversed the usual procedure and has required the vessel to wait and to proceed only after an affirmative signal. We are entitled to assume that the accident out of which this litigation arises was one of the important factors taken into consideration by the War Department in making the new regulations. Mr. Chandler was the one who made suggestions to the War Department (Ap. 202). It did not reason that the vessel should proceed toward the bridge and assume that the bridge would be timely opened.

When the trial judge concluded that appellant was negligent for failing to provide an auxiliary signal not dependent upon its power supply, he reached an impractical conclusion. The best proof of this is the current regulation by the War Department. It surely cannot be contended that Mr. Chandler in any way failed to exercise the care of an ordinarily prudent man when he meticulously complied with every requirement laid down by the one agency most experienced and we are entitled to assume best qualified to determine what should be done to safeguard vessels navigating the river. In fact appellant had gone beyond the requirements of due care as set out by the War Department in its regulation and had established the practice of blowing a whistle when the draw had been raised for river traffic. On p. 12 of the brief of appellee, Russell Towboat and Moorage Company, an attempt is made to answer our criticism that the tug did not wait for an affirmative signal from the bridge before attempting to proceed by saying "It is sufficient answer to this that the U.S. Engineers' official reg-

ulations governing this Bridge did not require any 'affirmative sign.' " By the same reasoning it was sufficient that the bridge operators had complied with all U.S. Engineers' official regulations governing this Bridge and that they did not require any auxiliary whistle or emergency flag. If navigators are entitled to govern themselves according to the official regulations, so is the bridge operator.

The important point is that the bridge operator complied with all regulations. The tug operator did not.

POINT III

Appellant's bridge did not need a draw span until the level of the water was raised by Bonneville Dam.

We feel it is important to keep in mind that the Hood River-White Salmon Bridge as originally designed did not need a lift span and did not have a lift span. It was opened for traffic in December, 1924. It had no lift span until after the level of the water was raised at the building of the Bonneville Dam. This dam was completed in April, 1940 (Ap. 173). The War Department participated in designing the lift span and it was paid for by the Federal Government (Ap. 190).

In our case then, we are faced with the novel situation that the bridge was not constructed so as to be a barrier or hindrance to navigation, but after the bridge was built and had been in use for a number of years, the level of the water was built up to the bridge and because

of this building up of the level of the water a lift span was made necessary, which in the absence of such changing of the level of the water was not required.

In *Southern Pacific Co. vs. Olympian Dredging Co.*, 260 U.S. 205, 43 S.Ct. 26, 67 L. Ed. 213, a new bridge was built and an old bridge nearby abandoned. The approval granted by the War Department was on condition that the old bridge would be removed. The conditions imposed were fully complied with. Subsequently a wing dam was constructed and dredging done by the government which caused old stumps of piles to protrude above the existing bed of the river. Thereafter, the dredger "Thor" drifted into the piles, her hull was pierced and she sank. Libel was filed to recover damages, which was dismissed by the District Court but the District Court was reversed by the Circuit Court of Appeals on the ground that petitioners should have anticipated change and should have guarded against the effect of the conditions upon the piles and that their failure to do so was actionable negligence.

The Supreme Court reversed the Circuit Court. It pointed out that Congress had granted the Secretary of War administrative power. It said (p. 208):

"In the light of this general assumption by Congress of control over the subject and of the large powers delegated to the Secretary, the condition imposed by that officer cannot be considered otherwise than as an authoritative determination of what was reasonably necessary to be done to insure free and safe navigation so far as the obstruction in question was concerned."

The Court continued by pointing out that petitioners having complied with the lawful order of the Secretary, had met their full responsibility. On p. 209 it said:

“The Secretary of War evidently concluded that the situation was such as to require the removal of the old bridge and piles, but not such as to require the removal of the latter beyond the depth fixed by his order. * * * * p. 210. They (the petitioners) were justified in proceeding upon the assumption that what the Secretary, in the exercise of his lawful powers, declared to be no obstruction to navigation, was in fact no obstruction.”

So, in our case, where appellant's bridge had been constructed in such manner as in no way to impair or impede river traffic and when the river was by an act of the government raised to such extent that it became necessary to put a lift span in the bridge and when the government supervised and paid for this lift span and thereafter through its properly delegated representative agency made rules and regulations regarding the operation of such bridge which rules and regulations were meticulously adhered to by the operator, said operator cannot be deemed negligent for failing to anticipate some unusual situation and in not providing some device not mentioned nor called for by any rule or regulation of the War Department. By the same reasoning used by the Supreme Court in the *Southern Pacific Co. vs. Olympian Dredging Co.* case, the condition imposed by the War Department cannot be considered otherwise than as an authoritative determination of what was reasonably necessary to be done. Inasmuch as it did not require an emergency whistle or an auxiliary signal, appellant can-

not be held negligent for not having such equipment. Under the reasoning of the Supreme Court in the language above quoted it had made an authoritative determination of what was reasonably necessary to be done to insure free and safe navigation so far as the bridge in question was concerned.

The War Department has charge of all the bridges throughout the country. It has been given the responsibility by Congress to determine what equipment and what rules and regulations are necessary for the operation of each individual bridge. It makes the rules and regulations consistent with the facts and circumstances surrounding each individual bridge. It did this in regard to the Hood River-White Salmon Bridge. All of these rules and regulations were carefully complied with by appellant. There has been an official determination of what is reasonable care and diligence at this particular place and appellant has met that full measure of responsibility. Therefore, appellant cannot be negligent in the only respect in which the Trial Court concluded that it was negligent. The conclusion of the Trial Court is clearly erroneous. The decree based thereon must be reversed.

POINT IV

Appellant makes no contention that there was an "Inevitable accident."

Beginning on p. 6 of appellee, Russell Family, Inc.'s brief, considerable effort is made to show that the burden is "heavily upon the party asserting such defense and is not to be lightly arrived at."

We make no claim of any kind that any damage here complained of resulted from inevitable accident. We feel that we have very clearly pointed out the very glaring negligence of the tug operator which directly caused the accident and damages complained of.

We are sure that, was there not such a close tie up between the appellees, Russell Family, Inc. would not be thinking of inevitable accident but would be joining with us in pointing out the reckless lack of due care of the tug operator.

CONCLUSION

The Trial Judge found no fact that will sustain his judgment. In concluding that appellant should have had an auxiliary whistle or some other signalling device not dependent upon the bridge's power lines, he required more than reasonable care as determined by the War Department, the federal agency charged by Congress with responsibility for determining what care shall be used at any particular bridge and setting out by regulation that which constitutes such care.

Appellee, Russell Towboat and Moorage Company, was culpably negligent in failing to maintain a lookout and, without signalling, in presuming its tow could pass under the raised span and proceeding into such position it could not control its tow after the tug operator learned the tow would not pass under the lift span.

The decree of the District Court should be reversed. Appellant should be awarded damages in the amount of \$30,621.18 as shown by the evidence and not questioned by either appellee in its brief. If Russell Family, Inc. is entitled to any relief it must be from Russell Towboat and Moorage Company.

Respectfully submitted,

H. LAWRENCE LISTER,

GRAY & LISTER,

1021 Equitable Building,

Portland, Oregon,

Proctors for Appellant.

No. 13056

United States
Court of Appeals
for the Ninth Circuit.

A. PAUL OLINGER AND RUTH HUFFMAN,

Appellants,

vs.

FRANK H. PARTRIDGE, Brigadier General,
United States of America, Commanding Gen-
eral, Camp Roberts, California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

NOV 14 1951

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A. PAUL OLINGER AND RUTH HUFFMAN,
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NAMES AND ADDRESSES OF
ATTORNEYS

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458 South Spring Street,
Los Angeles 13, California.

For Appellee:

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United States Attorney,

CLYDE C. DOWNING,

ROBERT K. GREAN,
Assistants U. S. Attorney,
600 U. S. Post Office & Court House Bldg.,
Los Angeles 12, California. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court, Southern
District of California, Central Division

No. 12917—HW

In the Matter of the Application of

A. PAUL OLINGER,

for a Writ of Habeas Corpus.

PETITION OF WRIT OF HABEAS CORPUS

To the United States District Court, Southern District of California, Central Division:

The petition of Ruth Huffman respectfully shows:

A. Paul Olinger, also known as Alphonse Paul Olinger, has been inducted into the military service of the United States of America, and is thereby detained, confined and restrained of his liberty by the Commanding General/Officer of Camp Roberts, a United States Army/Military Camp, Doe I, Doe II and Doe III, in the County of San Luis Obispo, State of California.

Your petitioner is the fiancée of the said A. Paul Olinger and is personally authorized by him to make this application in his behalf.

The said induction into the military service of the United States of America, detention, confinement and restraint are illegal; and the illegality thereof consists in this, to wit: [2]

Petitioner is informed and believes and on such information and belief alleges as follows:

1. A. Paul Olinger was before and at the time of

his draft and induction into the military service of the United States an officer in the United States Merchant Marine, and a licensed first assistant engineer of steam vessels under Chapter 11, Title 46, United States Code, and the first assistant engineer on the S.S. Willamette Victory, a steam vessel. Section 225, Chapter 11, of Title 46, United States Code, provides, among other things, that "No * * * engineer of steam vessels, licensed under this chapter shall be liable to draft in time of war except for the performance of duties such as required by his license." Notwithstanding the provisions of this section exempting him from draft and induction except for the performance of duties such as required by his license, A. Paul Olinger was drafted and inducted into the military service on or about February 6, 1951, not for the performance of duties such as required by his license.

2. First assistant engineer ship officers were and now are included in the list of critical occupations eligible for draft deferment. A. Paul Olinger was before and at the time of his draft and induction a licensed first assistant engineer ship officer on the S.S. Willamette Victory, and eligible for draft deferment; but, notwithstanding, he was drafted and inducted into the military service on or about February 6, 1951.

3. Local Draft Board No. 126, Long Beach, California, hereinafter referred to as draft board, acting under authority of the Selective Service Act and Regulations of the United States, and as a branch of the Executive Department of the United States,

classified A. Paul Olinger [3] as 1-A. Under the Selective Service Act and Regulations, A. Paul Olinger had the right to appear and discuss his 1-A classification with said draft board, to present new information, and to discuss his classification on the basis of information already on file and to make oral argument that the information already furnished when given proper weight, calls for a different classification. On or about August 5, 1950, after receiving notice from said draft board to report for physical examination, A. Paul Olinger personally appeared at said draft board for a personal interview to discuss his classification with which he was dissatisfied and to obtain a reclassification. At said time and place, said draft board refused to give him an interview, refused to hear him or his case, or to consider any new information which he offered to present to said draft board. In the later part of August, 1950, A. Paul Olinger received from said draft board a notice to report for his induction on September 18, 1950, on which date he was at sea and unable to report. Thereafter, while he was at sea, his attorney, Nicolas Ferrara, communicated with said draft board and discussed his case with Patricia Fish and requested, in substance, that A. Paul Olinger be given an opportunity to present his case to said draft board to which she replied that merchant seamen were not exempt and there was no necessity to have any hearings. On or about August 13, 1950, A. Paul Olinger requested of said draft board the opportunity of presenting his case personally to said draft board. Thereafter, on February

3, 1951, A. Paul Olinger personally appeared at said draft board to discuss his classification, at which time said draft board handed him a notice for him to report for induction on February 5, 1951, refused to hear him or his case and refused to consider any new information which he offered to [4] present at the time. Additionally, for the greatest part of his time, A. Paul Olinger was at sea and in the Orient aboard the S.S. Willamette Victory as first assistant engineer ship officer, and although he requested of said draft board a deferment classification and opportunity to make an appeal before said draft board, he received no answer to his requests from said draft board, nor did he receive from said draft board any notice of his right to appeal from his classification if he was dissatisfied; nor did he have the opportunity to appear before said draft board for a personal interview and discussion of his classification at an earlier date or to appeal from said draft board's classification by reason of his continued absence at sea. Before the filing of this petition, and before the draft and induction of A. Paul Olinger, the said Nicolas Ferrara, attorney for A. Paul Olinger, communicated with said draft board's appeal agent, a Mr. Kenneth A. Davis, Farmers & Merchants Building, Long Beach, California, and after a lengthy discussion requesting a hearing on A. Paul Olinger's classification, the said Mr. Davis refused to intervene and refused to hear his case for a deferred classification. Said draft board and each of the members thereof thereby acted and proceeded arbitrarily without due regard to A. Paul Olinger's

rights to which he was entitled under the Selective Service Act and Regulations and he was denied a fair hearing and due process; additionally, said draft board and each of the members thereof acted without jurisdiction in issuing an induction order drafting and ordering him to report for induction on February 5, 1951; and said draft board and each of the members thereof further acted without jurisdiction in drafting and inducting A. Paul Olinger into the military service of the United States on February 6, 1951. At no time did said draft board reclassify A. Paul Olinger after his request for a [5] deferment classification or after he personally appeared before said draft board for an interview to discuss his classification after requesting same; in any event, if A. Paul Olinger was reclassified, said draft board did not notify him of his reclassification.

A. Paul Olinger was inducted into the military service on February 6, 1951, at Los Angeles County, California, at about 8:00 a.m.; and he has been in the military service continuously since said time, and he has not been taken before any court or magistrate, and there is no law or provision for his release on bail.

Said A. Paul Olinger is not held by virtue of any complaint, indictment, presentment, warrant, or quarantine law, rule, regulation, arrest or order, except as above specifically set out. No other application for a writ of habeas corpus has been made by or in behalf of said A. Paul Olinger in regard to said restraint.

Wherefore, your petitioner prays that a writ of

habeas corpus may be granted, directed to the said Commanding General/Officer, Doe I, Doe II and Doe III, commanding him or them to have the said A. Paul Olinger before said court, at a time and place therein to be specified, to do and receive what shall then and there be considered by said court, concerning the person so restrained together with the time and cause of his detention, and said writ; and that he may be restored to his liberty.

Dated: March 1, 1951.

/s/ RUTH HUFFMAN,
Petitioner.

/s/ NICOLAS FERRARA,
Attorney for Petitioner and Applicant. [6]

State of California,
County of Los Angeles—ss.

Ruth Huffman being duly sworn, says that she is the petitioner named in the foregoing petition; that she has read the said petition and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief, and as to those matters she believes it to be true.

/s/ RUTH HUFFMAN

Subscribed and sworn to before me this March 1, 1951.

[Seal] /s/ NICOLAS FERRARA,
Notary Public in and for said County of Los Angeles, State of California.

[Endorsed]: Filed March 5, 1951.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE WHY WRIT OF
HABEAS CORPUS SHOULD NOT ISSUE

A petition for writ of habeas corpus having been
filed herein;

It Is Ordered, that the Commanding General/
Officer of Camp Roberts, a United States Army/
Military Camp, Doe I, Doe II and Doe III, in the
County of San Luis Obispo, State of California,
show cause in the United States District Court for
the Southern District of California, Central Division,
in the Federal Building, Los Angeles, California,
in the courtroom of Honorable Harry C. Westover,
one of the Judges of said Court, on Monday, the
9th day of April, 1951, at 10:00 a.m., why the writ
should not issue and the relief prayed for should
not be granted.

Dated: March 29, 1951.

/s/ HARRY C. WESTOVER,
Judge.

[7]

[Endorsed]: Filed March 29, 1951.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE WHY
WRIT OF HABEAS CORPUS SHOULD
NOT ISSUE

I, Frank H. Partridge, Brigadier General, USA, Commanding General, Camp Roberts, California, respondent herein, make the following return to the Order to Show Cause why Writ of Habeas Corpus should not issue in the above entitled action, in the manner set forth below.

I.

That A. Paul Olinger, listed in the records of the United States Army as Private Alphonse P. Olinger, US 56078595, having been found physically and mentally fit for training and service, was inducted into the Army of the United States on or about February 6, 1951 and is undergoing basic training at Camp Roberts, California.

II.

That the said A. Paul Olinger, hereinafter referred to as applicant, is not being illegally restrained, detained, and/or confined by your affiant but is in the custody of your affiant under proper and lawful authority as a private in the United States Army undergoing basic training.

III.

That authority to so train the applicant is found in paragraph (a) [8] of Section 454, Title 50 U.S. C.A., which states, "The President is authorized

from time to time, whether or not a State of War exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this Title such number of persons as may be required to provide and maintain the personnel strengths of the respective Armed Forces authorized by Section 2 of this Title, (Sec. 452, 50 U.S.C.A.).

IV.

That basic training is provided for all inductees and/or recruits who have not heretofore had military training of any kind in the Armed Forces of the United States.

V.

That applicant has had no previous military training and is therefore subject to the basic training required of all persons similarly situated.

VI.

That the present period of basic training prescribed is 14 weeks.

VII.

That applicant commenced his basic training February 26, 1951 and will not complete said training until June 2, 1951.

VIII.

That aside from the duties assigned in accordance with said basic training, appellant has not yet been assigned to any branch of the Army which considers the background and experience of the petitioner nor will he be so assigned until his basic training has been completed.

IX.

That said basic training is necessary to acquaint applicant with military dress, conduct and procedures which are fundamental and basic to orderly service in the Army of the United States before assignment to duties for which he may be qualified.

X.

That answering paragraph numbered (1) of the Petition for Writ of Habeas Corpus, respondent alleges that Section 225, Chapter 11, of Title 46, U.S.C., [9] which provides, among other things, that “No * * * engineer of steam vessels, licensed under this chapter shall be liable to draft in time of war except for the performance of duties such as required by his license,” (enacted May 28, 1896), upon which applicant relies, has been superseded by Section 17 of the Selective Service Act of 1948 (50 U.S.C., War Appendix, Sec. 467) which provides, “Except as provided in this Title, all laws and parts of laws in conflict with the provisions of this Title are hereby suspended to the extent of such conflict for the period for which this Title shall be in force.”

XI.

Answering paragraph numbered (2) of the Petition for Writ of Habeas Corpus, respondent alleges that with regard to the second sentence thereof he has no knowledge or information sufficient to form a belief as to the truth of the averments set forth therein and basing his denial upon such grounds denies each and every allegation contained therein, except that respondent admits that the applicant

was drafted and inducted into the military service on or about February 6, 1951.

Answering the first sentence of said paragraph, respondent denies the allegations thereof and alleges that the Selective Service Act of 1948 provides no authority for deferment or exemptions because of former or present service as merchant seaman; that Section 454 of Title 50, U.S.C.A., in subsection (a), provides, "Except as otherwise provided in this Title, every male citizen of the United States, * * * who is between the ages of 19 and 26, * * * shall be liable for training and service in the Armed Forces of the United States."

XII.

Answering paragraph numbered (3) of said Petition, respondent admits that Local Draft Board No. 126, Long Beach, California, acting under the authority of the Selective Service Act and Regulations of the United States, classified A. Paul Olinger as 1-A on October 8, 1948, and with regard thereto respondent further alleges that Selective Service System Form 110, notifying applicant of said classification was mailed to him on October 11, 1948. That said Form states, among other things, upon the face thereof the following: [10]

"Notice of Right to Appeal

Appeal from classification by Local Board must be made within 10 days after the mailing of this notice by filing a written notice of appeal with the Local Board.

Within the same 10 day period you may file

a written request for personal appearance before the Local Board. If this is done, the time in which you may appeal is extended 10 days from the date of mailing of the new Notice of Classification after such personal appearance.”

That applicant during the years 1948 and 1949 made no effort to appear and discuss his classification with said Draft Board to present new information or to discuss his classification on the basis of information already on file.

That respondent alleges that he has no knowledge or information sufficient to form a belief as to the truth of the averments set forth in all other respects in paragraph numbered (3) of said Petition and basing his denial upon such grounds denies the allegations therein contained, not hereinabove admitted.

Your respondent alleges however that your respondent, in accordance with Section 2f of AR 615-365, dated July 19, 1949, which section covers requests for a discharge based upon an individual's claim that prior to induction he was denied a procedural right as provided by the Selective Service Act of 1948, and was therefore erroneously inducted, made inquiry with regard to the legality of the induction of the applicant to the State Director of Selective Service System of the State of California, Colonel K. H. Leitch. Respondent was informed by the said Colonel K. H. Leitch, and upon such information and belief alleges that the applicant was not erroneously inducted, and the induction of said applicant was entirely legal and proper, as will more fully appear from the affidavits of Major E. N.

Keeley, AGC, District Coordinator for the Selective Service System of the State of California, which are attached hereto and made a part hereof. [11]

Wherefore, respondent prays that the Petition for Writ of Habeas Corpus be denied and that no Writ be issued.

/s/ FRANK H. PARTRIDGE,
Brigadier General, USA, Commanding General,
Camp Roberts, California.

Subscribed and sworn to before me at Camp Roberts, California, this 12th day of April, 1951.

/s/ F. M. SASSE, Lt. Col., JAGC,
Staff Judge Advocate, 7th Armored Division, Camp Roberts, California. With the general powers of a Notary Public under Article of War 114 (P. L. 800, 77th Cong., 14 Dec. 42; 56 Stat. 1050; 10 USC 1586) [12]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Southern District of California—ss.

I, E. M. Keeley, Major, AGC, of the United States, being first duly sworn, deposes and says:

I.

That I am District Coordinator for the Selective Service System in the State of California, District No. 5, at Los Angeles, California, and the personal

representative of the State Director of Selective Service.

II.

That Local Draft Board No. 126, Long Beach, California, is within said district, the coordination of which is under my supervision.

III.

That one of my duties as District Coordinator is the review of procedures of Local Boards and Appeal Boards.

IV.

That your affiant has fully reviewed the selective service file of registrant Alphonse P. Olinger, 4-126-26-302, and that I am fully familiar [13] with the selective service file of said registrant.

V.

That Alphonse Paul Olinger was classified 1-A by Local Board No. 126, Long Beach, California, on October 8, 1948. That on October 11, 1948 Selective Service System Form No. 110 was mailed to said registrant advising him that he had been classified 1-A.

VI.

That said Form 110, a copy of which is attached hereto, made a part hereof and marked Exhibit "A", shows on its face the rights of the registrant to appeal such classification.

VII.

That Section 1624.1 issued under Section 10, Pub. Law 759, 80 Cong., provides the registrant an opportunity to appear in person and states as follows:

“(a) Every registrant, after his classification is determined by the Local Board, shall have an opportunity to appear in person before the member or the members of the Local Board designated for the purpose if he files a written request therefor within 10 days after the Local Board has mailed a Notice of Classification (SSS Form 110) to him. Such 10 day period may not be extended except when the Local Board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

“(b) * * * No registrant may be represented before the Local Board by anyone acting as attorney or legal counsel.”

VIII.

Paragraph 1625.2 covering the situation when registrant's classification may be reopened and considered anew, states:

“The Local Board may re-open and consider anew the classification of a registrant (1) upon the written request of the registrant * * * or any person who has on file a written request for the current deferment of [14] the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification.” (Emphasis added.)

IX.

Section 1625.4 of said Act states:

“When a registrant * * * files with the Local Board a written request to reopen and consider anew the

registrant's classification and the Local Board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the Local Board is of the opinion that such facts if true would not justify a change in such registrant's classification, it shall not re-open the registrant's classification." (Emphasis added.)

X.

Appeal to Appeal Board is covered by Part 1626 of the Selective Service System, issued under Section 10, Pub. Law 759, 80 Cong., and states in Section 1626.2:

"(a) The registrant * * * may appeal to an Appeal Board from any classification of a registrant by the Local Board * * *

"(c) The registrant * * * may take an appeal authorized under paragraph (a) of this section at any time within the following periods:

(1) Within 10 days after the date the Local Board mails to the registrant a Notice of Classification (SSS Form No. 110). [15]

(2) Within 30 days after the date the Local Board mails to the registrant a Notice of Classification (SSS Form No. 110) if, on that date it appears that the registrant is located in one and the local board which classified the registrant is located in another of the following: The Continental United States, the

Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands of the United States.

(4) Within 60 days after date the Local Board mails to the registrant a Notice of Classification, if on that date it appears that the registrant is located outside the Continental United States, * * *

“(d) * * * Unless the Local Board thereafter permits an appeal, the right of such persons to appeal shall expire at the end of the period provided for in paragraph (c) of this section.”

XI.

That said registrant made no written or oral request for personal appearance or appeal within the limits as set out in the sections of the Selective Service Act of 1948 as quoted above, nor at any time within a two year period elapsing thereafter, nor did anyone within such time file written or oral request for appearance or appeal on behalf of registrant, but your affiant states with regard thereto that the registrant appeared in person at said Draft Board for the first time on or about August 11, 1950, approximately 7 days after Form 223 ordering registrant to report for a pre-induction physical examination on August 15, 1950, was mailed to him.

XII.

Registrant failed to report for said examination.

XIII.

That no facts or new information, which, if true, would justify a change in the registrant's classifica-

tion, and would thus cause registrant's [16] classification to be reopened and considered anew has ever been submitted to said board. That said board is and was well aware of the fact that registrant had served and was now serving in the Merchant Marine as an assistant engineer duly licensed, but states that deferment for said occupation is not provided for by the Selective Service Act of 1948.

XIV.

That Local Board Memorandum No. 5 issued by General Lewis B. Hershey, Director, National Headquarters Selective Service System, issued October 18, 1948, a true copy of which is attached hereto and made a part hereof, and marked Exhibit "B", defines the status under the Selective Service Act of 1948 of former Merchant Seamen.

XV.

That no request for occupational deferment by any employer of registrant has ever been made.

XVI.

That on September 7, 1950 Form No. 252 ordering registrant to report for induction on September 18, 1950 was mailed to registrant. That registrant failed to report.

XVII.

That on September 22, 1950, after registrant's file was found to be in all respects procedurally proper upon review by one Mr. Hall, a member of said board, the registrant was reported delinquent to the Office of the United States Attorney.

XVIII.

After registrant was contacted by an Agent of the Federal Bureau of Investigation, arrangements were made to process said registrant as a delinquent through the Army Induction Center at 155 West Washington Boulevard, Los Angeles, California.

XIX.

That said registrant was on February 6, 1951 inducted into the Army of the United States. [17]

XX.

That your affiant has carefully reviewed all procedures taken with respect to said registrant and has found them to be entirely in accordance with the laws and regulations of the Selective Service System appertaining thereto, and further states that the classification and induction of said registrant, together with all intermediate steps taken therein, are entirely legal and proper.

Further affiant sayeth not.

/s/ E. M. KEELEY,
Major, AGC, District Coordinator, Los Angeles,
California.

Subscribed and Sworn to before me this 13th day
of April, 1951.

[Seal] /s/ JACK E. HILDRETH,
Notary Public in and for the County of Los Angeles,
State of California. [18]

EXHIBIT "A"

Selective Service System

NOTICE OF CLASSIFICATION

Approval of Budget Bureau not required

.....
(Last name) (First name) (Middle name)

Selective Service No. [] [] [] []
has been classified in Class.... (Until.....,
19....) by [] Local Board. [] Appeal Board,
by vote of to [] President
(Show vote on appeal board cases only)

....., 19....
(Date of mailing) (Member of local board)

The law requires you, subject to heavy penalty for violation, to carry this notice, in addition to your Registration Certificate, on your person at all times—to exhibit it upon request to authorized officials—to surrender it, upon entering the armed forces, to your commanding officer.

For advice, see your Government appeal agent.

The law requires you: (1) To keep in touch with your local board; (2) to notify it of any change of address; (3) to notify it of any fact which might change your classification; (4) to comply with the instructions on the notice of classification part of this form.

NOTICE OF RIGHT TO APPEAL

Appeal from classification by local board must be made within 10 days after the mailing of this notice by filing a written notice of appeal with the local board.

Within the same 10-day period you may file a written request for personal appearance before the local board. If this is done, the time in which you may appeal is extended to 10 days from the date of mailing of a new Notice of Classification after such personal appearance.

If an appeal has been taken and you are classified by the appeal board in either Class 1-A or Class 1-A-O and one or more members of the appeal board dissented from such classification you may file a written notice of appeal to the President with your local board within 10 days after the mailing of this notice. [19]

EXHIBIT "B"

National Headquarters, Selective Service System
Washington 25, D. C.

Local Board Memorandum No. 5

Issued: October 18, 1948

Subject: Status of Former Merchant Seamen Under Selective Service Act of 1948.

1. Service in the Merchant Marine during World War II.—(a) It has come to the attention of this Headquarters that there exists on the part of many local boards and others connected with the Selective

Service System a lack of full information on the status under the Selective Service Act of 1948 of former merchant seamen who served in the Maritime Service during the war and emergency.

(b) The Selective Service Act of 1948 provides exemption from military service during peacetime for men who performed certain periods of Active Military Duty during the recent emergency and war.

(c) The service performed by members of the Merchant Marine, including cadet-midshipmen, being a civilian service and not a military service, does not qualify them for these exemptions.

2. Certificates Issued to Merchant Seamen.—(a) The Certificate of Completion of a Period of Substantially Continuous Service in the Merchant Marine which merchant seamen received from the War Shipping Administration was not a discharge from the armed forces of the United States.

(b) This Certificate was issued by the War Shipping Administration for the purpose of establishing eligibility for members of the Merchant Marine for reemployment rights provided under Public Law 87, 78th Congress.

(c) The notation "eligible to be relieved from any further consideration for classification into a class available for service", stamped on this Certificate by the War Shipping Administration was evidence of the value which the War Shipping Administration placed upon the services of the individual seamen. Selective Service local boards under the 1940 Act were authorized to consider this information in making their determination as to whether or not At

That Time such individual had made a sufficient contribution to the war effort to warrant his relief from further liability for service under the Selective Training and Service Act of 1940.

3. Deferment or Exemption Because of Former Service in Merchant Marine Not Authorized.—(a) The Selective Training and Service Act of 1940 expired on March 31, 1947, and as the Selective Service Act of 1948 provides no authority for deferments or exemptions because of former service as merchant seamen, this certificate has no bearing on the action of local boards established under this 1948 Act.

(b) Persons who were enrolled in the United States Merchant Marine Academy as cadet-midshipmen were given a reserve status in the Navy, so that during the time that they were pursuing their course of instruction at the academy they would be relieved from liability for service under the Selective Service Act of 1940. Upon graduation, these young men were given the opportunity to elect whether or not they would serve as ensigns on active duty in the United States Navy. Those who did not take advantage of the opportunity to serve in the United States Navy were given licenses for the Merchant Marine.

(c) Men who attended one of the Merchant Marine academies as cadet-midshipmen, while holding during that time a protective U. S. Naval Reserve status, actually performed no active duty service with the armed forces such as would qualify them for a peacetime exemption from service under section 6(b)(1) and (2) of the Selective Service Act of

1948. Nor is it believed, in view of the legislative history of this Act, that administrative action to bring about deferment by reason of former employment as merchant seamen would be consistent with the expressed will of the Congress in this matter.

/s/ LEWIS B. HERSHEY,
Director. [21]

POINTS AND AUTHORITIES

Applicant has waived right to personal appearance and appeal.

“If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege.” Sec. 10 Pub. Law. 759, 80th Cong. (Title 32 CFR § 1641.2 (b)) *United States ex rel La Charity vs. Commanding Officer*. 142 F. 2d 381, 382 (1944).

Boards refusal to reopen case at request of registrant is not a denial of due process. *Smith vs. U. S.*, 157 F. 2d 176, 181 (1946) which states:

“Whether or not the additional evidence was of sufficient weight to require a reopening of the case lay within the discretion of the board.”

and it cannot be said under the circumstances that the discretion was arbitrarily exercised.

Habeas Corpus may not be used as a writ of error and its function is exhausted when it is ascertained that the agency under whose order the petitioner is

being held had jurisdiction to act. *Eagles Post Commanding Officer vs. U. S.*, 329 U. S., 304, 311, 315 (1946).

[Endorsed]: Filed April 14, 1951.

[22]

PETITIONER'S EXHIBIT No. 1

U. S. Department of Labor
Office of the Secretary, Washington

Mrs. Pauline G. Pujol
8705 Wadsworth Avenue
Los Angeles, California

Feb. 13, 1951

Dear Mrs. Pujol:

The receipt is acknowledged of your letter dated January 17, concerning the deferment of your son.

You will be pleased to learn that under date of January 24, the Selective Service System furnished to their local boards copies of the enclosed list of essential activities and critical occupations as information to assist them in making determinations on requests for the deferment of registrants. You will note on page 25 of the enclosure that Assistant Engineers have recently been added to the list of critical occupations.

In view of this occupational information having recently been made available to local boards, you and your son's employer may wish to discuss further with the board the possibility of obtaining a deferment. For your information, there is assigned to each local board an Appeal Agent from whom information can be obtained with regard to procedures

for appealing from decisions of the local board. It may be advisable to discuss the matter with the Appeal Agent assigned to the board which classified your son.

The Selective Service System is the department of government vested with authority to make determinations on requests for the deferment of registrants.

I am sure the local board will be pleased to consider this case in accordance with established rules and regulations for the implementation of the Selective Service System Act of 1948, as amended.

Yours very truly,

/s/ MAURICE J. TOLIN,

Enclosure

Secretary of Labor.

January 15, 1951

Second Addition to Initial List of Critical
Occupations Dated August 3, 1950

Metal Miner, Underground, All Around (Miner 5-21.020, DOT p. 857):

Performs all or a significant combination of the duties involved in driving underground openings to extract ore or rock. Drills holes in working face of ore or rock with a hand or machine drill. Inserts explosives in drill holes and sets it off to break up the mass. Shovels ore or rock into mine cars or onto a conveyor. Pushes mine cars to haulage ways where they are hauled by draft animal, mine locomotive (motor), or haulage cable to the surface, or to the shaft bottom for hoisting. Installs timbering to sup-

port the walls and roof, or for chutes or staging. Lays mine track to extend it to working face. Sinks shaft (in rock) from the surface or from one level to lower levels, in which men, supplies, ore, and rock are lowered into or raised from the mine. This title includes all related titles with the same Dictionary of Occupational Titles code number.

Orthopedic Appliance and Limb Technician (5-09.)

General Definition:

Lays out, makes, and fits artificial limbs and other devices according to customers' specifications and medical prescriptions: Studies specifications or makes plaster casts of stump and normal limbs or body deformity, employing knowledge of limb structure. Selects stock lumber, fibre, metal, or leather, and draws patterns to scale or marks materials. Cuts and carves wooden limbs to specified dimensions, using hand and machine carving tools. Finishes limbs following preliminary fitting by removing wood from exterior or interior parts to reduce weight and obtain proper balance and contour, and fills, sands, and polishes wood. Winds damp fibres around wood forms in fibre-winding machine. Shapes, anneals, and welds sheet-metal tubing and assembles parts of limbs, using bolts, screws, and rivets. Cuts, positions, stretches, molds, and sews plastic or leather to cover limbs or fabricate parts such as leather stump sockets. Makes and repairs arch supports, orthopedic braces, and appliances for feet, legs, and body deformities; cuts and fashions supports from stainless steel, plastics, cork, steel, and leather, using welding equipment, shears, rivet punch, electric drill, chisels,

saws, hammers, and other hand tools. Fits assembled artificial limbs and devices to customer, and adjusts holding-harnesses. This definition includes all titles in the Dictionary of Occupational Titles code group 5-09.400-599, except Surgical-Elastic Knitter, Hand Frame; Artificial-Limb Assembler; Seamstress; Socket Maker; Plastic-Bucket Maker; and Welder-and-Finisher.

Sawsmith:

As a key step in the manufacture of stone-, wood-, metal-, and plastics-cutting band saws, hand saws, and circular saws, smiths (straightens, dekinks, and alines) saw blades made of high grade steel: Receives hardened and tempered blades, and hoists blade on anvil table beneath stretching roller. Manipulates levers to lower electric powered roller on blade and stretch (roll) blade at one or more locations, to impart desirable tension along edges of blade and alter mechanical characteristics of central part of blade. Applies pressure with roller according to size and type of blade, speed and feed at which the saw will operate, and metallurgical characteristics of steel. Hammers out kinks, dents, humps, twists, or bulges in surface of blade using special flat-peen hammers, and gauges surface for trueness by experienced visual observation and by use of straightedge. Inspects entire blade for absolute flatness, straightness, absence of kinks, humps, or other imperfections; rejects blades that show evidence of mechanical or metallurgical defects. This is meant to include only those sawsmiths concerned with the manufacture of industrial saws.

Expanded Definitions

Engineer, Chief, Marine, and Assistant Engineers—

General Definition:

Repairs and operates, or assumes complete charge of, all engines, boilers, electrical equipment, refrigeration equipment, sanitary equipment, deck machinery, and steam connections aboard ship: Keeps log of performance of equipment on voyage. Requisitions supplies and repairs and oversees fueling of ship. Starts, stops, and controls speed of engines, pumps, injectors, condensers, boilers, and supplementary equipment. Supervises workers in engine room. Makes all types of repairs, using machinist's tools and machine-shop equipment. This title includes Engineer, Chief, Marine 0-88.21, and Engineer (water trans.) 0-88.24 and the First Assistant Engineer, Second Assistant Engineer, and Third Assistant Engineer but does not include engineers engaged in such work aboard dredges, tugboats, ferryboats, or fishing vessels.

[Endorsed]: Filed April 16, 1951.

In the United States District Court in and for the
Southern District of California, Central Division

No. 12917—HW—Civil

In the Matter of the Application of

A. PAUL OLINGER,

for a Writ of Habeas Corpus.

ORDER DISMISSING PETITION FOR WRIT
OF HABEAS CORPUS

The above entitled matter came on regularly for hearing on an order to show cause why a writ of habeas corpus should not issue, on April 16, 1951, in the above entitled Court, before the Honorable Harry C. Westover, the applicant being represented by his attorney, Nicolas Ferrara, and the respondent by its attorneys, Ernest A. Tolin, United States Attorney, and Clyde C. Downing and Robert K. Grean, Assistants United States Attorney, appearing by Robert K. Grean, and the Court having requested briefs from counsel on the question of whether or not the Court had jurisdiction, and the matter having been submitted for decision on the matter of jurisdiction, and having been duly considered by the said Court, and the Court having read the briefs of counsel and being fully satisfied in the premises:

It Is Hereby Ordered, Adjudged and Decreed that the Petition for Writ of Habeas Corpus, filed herein on March 5, 1951, shall be, and hereby is, dismissed, and that the Order to Show Cause issued

herein be, and hereby is, discharged, for lack of jurisdiction of this Court to hear said matter on its merits.

Costs taxed at \$20.00.

Dated: June 21st, 1951.

/s/ HARRY C. WESTOVER,
United States District Judge.

Judgment entered June 22, 1951.

[Endorsed]: Filed June 21, 1951. [27]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable Harry C. Westover, Judge of the District Court; Respondent Frank H. Partridge, Brigadier General, United States of America, Commanding General, Camp Roberts, California; Ernest A. Tolin, United States Attorney, Clyde C. Downing and Robert K. Grean, Assistant United States Attorney:

Notice is hereby given that A. Paul Olinger, applicant named above, and Ruth Huffman, petitioner in the above-entitled proceedings, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Judgment, Decree or Order Dismissing the Petition for Writ of Habeas Corpus made and entered on June 22, 1951, in Judgment

Book No. 73, Page 183, and from the whole of said Judgment, Decree or Order.

Dated: July 11, 1951.

/s/ NICOLAS FERRARA,

Attorney for said Applicant and
Petitioner. [29]

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 11, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 33, inclusive, contain the original Petition for Writ of Habeas Corpus; Order to Show Cause Why Writ of Habeas Corpus Should Not Issue; Return to Order to Show Cause Why Writ of Habeas Corpus Should Not Issue; Petitioner's Exhibit 1; Order Dismissing Petition for Writ of Habeas Corpus; Notice of Appeal and Designation of Record which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 15th day of August, A.D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk

[Title of District Court and Cause.]

AFFIDAVIT OF NICOLAS FERRARA FOR
ORDER OF SPECIAL APPOINTMENT
TO SERVE PROCESS

(F.R.C.P. Rule 4(c))

State of California,
County of Los Angeles—ss.

Nicolas Ferrara being duly sworn, deposes and says:

That he is the attorney of record for applicant A. Paul Olinger and petitioner Ruth Huffman in the above-entitled habeas corpus proceedings. On March 6, 1951, the above-entitled court made and issued an order to show cause why writ of habeas corpus should not issue, a copy of which, together with a copy of the petition for writ of habeas corpus filed in the above-entitled proceedings, are required to be served personally upon the Commanding General/Officer of Camp Roberts, a United States Army/Military Camp located in the County of San Luis Obispo, State of California.

Affiant is informed and believes and upon such information and belief alleges that Camp Roberts is two hundred eighteen miles, more or less, from Los Angeles, California, and the United States Marshal in Los Angeles, California, demands travel fees in the sum of approximately \$50.00 to serve personally the aforementioned order and petition. To effect sub-

stantial savings in travel fees to serve the process above-mentioned, request is made for special appointment of the Sheriff of the County of San Luis Obispo, California, or one of his Constabularies, to serve the process above-mentioned, and affiant is informed and believes and upon such information and belief alleges that said special appointment will result in substantial savings in travel fees to effect personal service of the process above-mentioned. This request is made pursuant to Rule 4(c) of the Federal Rules of Civil Procedure which provides for special appointment.

NICOLAS FERRARA

Subscribed and sworn to before me this March 27, 1951.

[Seal] /s/ BURKE MATHES,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed March 29, 1951.

[Title of District Court and Cause.]

ORDER OF SPECIAL APPOINTMENT TO
SERVE PROCESS
(F.R.C.P. Rule 4(c))

The affidavit of Nicolas Ferrara for special appointment to serve process having been filed herein;

It Is Ordered, that the Sheriff of the County of San Luis Obispo, State of California, or one of his Constabularies be and he/they are hereby specially appointed to personally serve the Commanding General/Officer of Camp Roberts, a United States Army/Military Camp, in the County of San Luis Obispo, State of California, with a copy of the petition for writ of habeas corpus filed herein and with a copy of the order to show cause why writ of habeas corpus should not issue made and filed herein by the above-entitled court, together with a copy of this order of special appointment.

Dated: March 28th, 1951.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed March 29, 1951.

At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 9th day of April in the year of our Lord one thousand nine hundred and fifty-one.

Present:

The Hon. Harry C. Westover, District Judge.

[Title of Cause.]

MINUTE ORDER

For hearing on Order to Show Cause, filed March 29, 1951, why writ should not issue and the relief prayed for should not be granted;

On motion of Robert Grean, Ass't U. S. Att'y, appearing as counsel for respondent, it is ordered that the matter is continued to April 16, 1951, 10 a.m., for said hearing.

At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 4th day of June in the year of our Lord one thousand nine hundred and fifty-one.

Present:

The Hon. Harry C. Westover, District Judge.

[Title of Cause.]

MINUTE ORDER

The petition for Writ of Habeas Corpus herein, heretofore heard and submitted for decision on the question of jurisdiction, having been duly considered, it is now ordered that said petition is denied; counsel for respondent will prepare, serve, and present appropriate formal documents under Local Rule 7 accordingly.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages comprise the original Affidavit and Order of Special Appointment to Serve Process and a full, true and correct copy of minute orders entered April 9 and June 4, 1951.

Witness my hand and the seal of said District Court this 8th day of October, A.D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk

[Endorsed]: No. 13056. United States Court of Appeals for the Ninth Circuit. A. Paul Olinger and Ruth Huffman, Appellants, vs. Frank H. Partridge, Brigadier General, United States of America, Commanding General, Camp Roberts, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: August 16, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 13,056

In the Matter of the Application of
A. PAUL OLINGER,
for a Writ of Habeas Corpus

A. PAUL OLINGER,
Petitioner and Appellant,
vs.

FRANK H. PARTRIDGE, etc.,
Respondent and Appellee.

APPELLANT'S STATEMENT OF POINTS

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause:

I.

The District Court erred in finding and/or concluding that it had no jurisdiction to review the Draft Board's findings and order of induction which appellant attacked as being void on the grounds that the Draft Board had no jurisdiction and the Draft Board acted in violation of due process of law, because appellant did not exhaust his administrative remedies under the Selective Service Act in that he failed to take the administrative appeals provided under said Act.

II.

The District Court erred in finding and/or con-

cluding that it had no jurisdiction to review the Draft Board's findings and order of induction which appellant attacked as being void on the grounds that the Draft Board had no jurisdiction and said findings and order were in violation of the provisions of 46 USCA, sec. 225, Chapter 11, because appellant had not taken the administrative appeals provided by the Selective Service Act.

III.

The District Court erred in finding and/or concluding that it had no jurisdiction to review the legality of appellant's detention in the military service of the United States when and where he is being detained contrary to and in violation of the provisions of 46 USCA, sec. 225, Chapter 11, because appellant had not taken the administrative appeals provided by the Selective Service Act.

Dated: August 28, 1951.

/s/ NICOLAS FERRARA,
Attorney for Appellant,
A. Paul Olinger.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 29, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

The entire record herein is hereby designated as the record which is material to the proper consideration of the appeal filed by A. Paul Olinger, applicant and Ruth Huffman, petitioner, in the above-entitled cause, said record and transcript being more particularly designated as follows:

1. Petition for writ of habeas corpus.
2. Order to show cause returnable April 9, 1951.
3. Affidavit for order of special appointment to serve process.
4. Order of special appointment to serve process.
5. Order of continuance to April 16, 1951, for hearing on order to show cause.
6. Return to order to show cause why writ of habeas corpus should not issue, and all exhibits.
7. Order denying petition for writ of habeas corpus.
8. Order dismissing petition for writ of habeas corpus, and discharge of order to show cause heretofore issued herein, for lack of jurisdiction, heretofore filed June 21, 1951.
9. Notice of Appeal.
10. Designation of record.

11. Appellant's statement of points.

Dated: August 28, 1951.

/s/ NICOLAS FERRARA,
Attorney for Petitioner and
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 29, 1951. Paul P. O'Brien,
Clerk.

No. 13056.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. PAUL OLINGER and RUTH HUFFMAN,

Appellants,

vs.

FRANK H. PARTRIDGE, Brigadier General, United States
of America, Commanding General, Camp Roberts, Cali-
fornia,

Appellee.

On Appeal From the United States District Court for the
Southern District of California Central Division

Hon. Harry C. Westover, Judge.

APPELLANTS' OPENING BRIEF.

NICOLAS FERRARA,

1120 Rowan Building,
458 South Spring Street,
Los Angeles 13 California,

Attorney for Appellants.

FILED

NOV 27 1951

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I.

<p>A draftee who has undergone induction into the military service, may by habeas corpus proceedings, obtain a judicial review of the legality of his classification and induction on the grounds that his local draft board acted in excess of its jurisdiction, arbitrarily, and in violation of due process of law, even though prior to his induction the draftee failed to take an administrative appeal from his classification by the local board</p>	9
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II.

A draftee who has undergone induction into the military service, may by habeas corpus proceedings, obtain a judicial review of the legality of his classification and induction on the grounds that such classification and induction were in violation of the provisions of 46 U. S. C. A., Section 225, Chap. 11, even though prior to his induction the draftee failed to take an administrative appeal from his classification by the local board..... 15

III.

A draftee who has undergone induction into the military service, may by habeas corpus, obtain a judicial review of the legality of his detention in the military service of the United States on the grounds that he is being detained contrary to and in violation of the provisions of 46 U. S. C. A., Section 225, Chapter 11, even though prior to his induction the draftee failed to take an administrative appeal from his classification by the local board..... 17

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No. 13056.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. PAUL OLINGER and RUTH HUFFMAN,

Appellants,

vs.

FRANK H. PARTRIDGE, Brigadier General, United States
of America, Commanding General, Camp Roberts, California,

Appellee.

APPELLANTS' OPENING BRIEF.

I.

Statement of the Pleadings and Facts Disclosing Jurisdiction.

On March 5, 1951, in the United States District Court, in and for the Southern District of California, Central Division, appellants filed a petition for writ of *habeas corpus* seeking the release of appellant A. Paul Olinger from military service [Tr. p. 3]. The particular grounds thereof are set out in detail in the petition [Tr. pp. 3-8], and briefly they are:

(1) Appellant A. Paul Olinger was before and at the time of his draft and actual induction into the military

No. 13056.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. PAUL OLINGER and RUTH HUFFMAN,

Appellants,

vs.

FRANK H. PARTRIDGE, Brigadier General, United States
of America, Commanding General, Camp Roberts, California,

Appellee.

APPELLANTS' OPENING BRIEF.

I.

Statement of the Pleadings and Facts Disclosing Jurisdiction.

On March 5, 1951, in the United States District Court, in and for the Southern District of California, Central Division, appellants filed a petition for writ of *habeas corpus* seeking the release of appellant A. Paul Olinger from military service [Tr. p. 3]. The particular grounds thereof are set out in detail in the petition [Tr. pp. 3-8], and briefly they are:

(1) Appellant A. Paul Olinger was before and at the time of his draft and actual induction into the military

service of the United States on February 6, 1951, an officer in the United States Merchant Marine, and a licensed first assistant engineer of steam vessels under Chapter 11, Title 46, *United States Code*; and therefore his said draft and induction were contrary to the provisions of 46 *USCA*, Chapter 11, Sec. 225, which provides, among other things, that [Tr. pp. 3-4],

“ . . . No . . . engineer of steam vessels, licensed under this chapter shall be liable to draft in time of war except for the performance of duties such as required by his license”

(2) First assistant engineer ship officers were and now are included in the list of critical occupations eligible for draft deferment [Tr. p. 4].

(3) The draft board acted and proceeded arbitrarily, denied appellant A. Paul Olinger a fair hearing and due process, and acted without or in excess of jurisdiction [Tr. pp. 4-7].

On March 29, 1951, said District Court issued its order to show cause why writ of *habeas corpus* should not issue [Tr. p. 9].

On April 14, 1951, appellee filed its return to order to show cause why writ of *habeas corpus* should not issue. The particulars thereof are set out in detail in said return [Tr. pp. 10-26], but reference thereto will be made briefly to certain allegations thereof. They are as follows:

(1) Appellant A. Paul Olinger was drafted and inducted into the Army of the United States on February 6, 1951 [Tr. pp. 10, 12-13, 21].

(2) Appellant A. Paul Olinger has not yet been assigned to duties such as required by his license as a first assistant engineer officer in the United States Merchant Marine [Tr. p. 11].

(3) 46 *USCA*, Chapter 11, Section 225, has been superseded by Section 17 of the *Selective Service Act* of 1948 (50 *U.S.C.*, *War Appendix*, Sec. 467) [Tr. p. 12].

(4) The Selective Service Act of 1948 provides no authority for deferment or exemptions of merchant seaman, and cites Section 454, Title 50, *USCA*, Subsection (a) in support of said contention [Tr. p. 13].

(5) On October 8, 1948, the draft board classified appellant A. Paul Olinger as 1-A and written notice of said classification (*SSS Form 110*) was mailed to him on October 11, 1948, which contained a notice of his right to appeal therefrom or file a written request for personal appearance before the local board within ten days after the mailing of the notice [Tr. pp. 13-14, 16, 22-23].

(6) During the years 1948 and 1949, appellant A. Paul Olinger made no effort to appear and discuss his classification with the draft board, to present new information or to discuss his classification on the basis of information already on file [Tr. p. 14].

(7) Appellant A. Paul Olinger did not take any appeal nor filed any oral or written request for personal appearance before the local board [Tr. p. 19].

(8) Appellant A. Paul Olinger appeared in person at the local board on or about August 11, 1950, which was

about seven days after notice to report for physical examination on August 15, 1950, was mailed to him [Tr. p. 19].

(9) No facts or new information, which, if true, would justify a change in appellant A. Paul Olinger's classification, has ever been submitted to the local board [Tr. pp. 19-20].

(10) The local board is and was well aware of the fact that appellant A. Paul Olinger had served and was now serving in the Merchant Marine as a duly licensed assistant engineer [Tr. p. 20].

(11) On September 7, 1950, an induction order was mailed to appellant to report for induction on September 18, 1950.

Petitioner's Exhibit No. 1 contains a United States Department of Labor second addition to initial list of critical occupations dated August 3, 1950, which includes first assistant engineers who are eligible for draft deferment [Tr. pp. 27-31 at p. 31].

On June 21, 1951, said District Court made an order dismissing the petition for writ of *habeas corpus*, and discharging the order to show cause issued herein, for lack of jurisdiction of said court to hear said matter on its merits [Tr. pp. 32-33, 38]. The order, decree or judgment was entered on June 22, 1951 [Tr. p. 33] from which this appeal was taken on July 11, 1951 [Tr. pp. 33-34].

At the time the petition was filed appellant A. Paul Olinger was detained of his liberty by the Commanding General of Camp Roberts, a United States Army/Mili-

tary Camp, in the County of San Luis Obispo, State of California,, which is within the jurisdiction of the United States District Court, Southern District of California, Central Division, and the petition for writ of *habeas corpus* was filed in said District Court (New Title 28, *United States Code*, Sec. 2242).

Writs of *habeas corpus* may be granted by the District Court within their respective jurisdiction (New Title 28, *United States Code*, Sec. 2241).

In a *habeas corpus* proceedings before a District Court Judge, the final order shall be subject to review, on appeal, by the Court of Appeals for the Circuit where the proceeding is had, in this case in and for the Ninth Circuit (New Title 28, *United States Code*, Sec. 2253).

The remedy of *habeas corpus* extends to a case where a person is in custody in violation of the Constitution or of a law of the United States (*R. S.*, Sec. 753, 28 *United States Code*, Sec. 453).

II.

Statement of the Case.

This matter came on regularly for hearing on the order to show cause why a writ of *habeas corpus* should not issue, on April 16, 1951, in said District Court, Honorable Harry C. Westover, judge presiding. At that time the court requested briefs of counsel on the question of whether or not the court had jurisdiction to hear this cause on its merits, because appellant A. Paul Olinger had not taken an administrative appeal from his draft board classification of 1-A with which he was dissatisfied, as provided by the Selective Service Act and Regulations issued pursuant thereto. Pursuant to such request counsel filed their respective briefs with said court.

On June 21, 1951, said District Court made an order, judgment or decree dismissing the petition for writ of *habeas corpus*, and discharging the order to show cause issued in this cause, for lack of jurisdiction to hear this matter on its merits [Tr. pp. 32-33]. The order, judgment or decree was entered on June 22, 1951 [Tr. p. 33], from which this appeal was taken on July 11, 1951 [Tr. pp. 33-34].

III.

Question Involved.

The sole question therefore presented by this appeal is whether appellant A. Paul Olinger who had not taken an administrative appeal from his classification by the local board, but had undergone actual induction into the military service, may by *habeas corpus* proceedings obtain a judicial review of the legality of his classification and induction.

IV.

Specifications of Error.

On this appeal appellants rely upon the following statement of points which are set out also in the Transcript of Record, pages 40-41.

I.

The District Court erred in finding and/or concluding that it had no jurisdiction to review the Draft Board's findings and order of induction which appellant attacked as being void on the grounds that the Draft Board had no jurisdiction and the Draft Board acted in violation of due process of law, because appellant did not exhaust his administrative remedies under the Selective Service Act in that he failed to take the administrative appeals provided under said Act.

II.

The District Court erred in finding and/or concluding that it had no jurisdiction to review the Draft Board's findings and order of induction which appellant attacked as being void on the grounds that the Draft Board had no jurisdiction and said findings and order were in violation of the provisions of 46 *USCA*, sec. 225, Chapter 11, because appellant had not taken the administrative appeals provided by the Selective Service Act.

III.

The District Court erred in finding and/or concluding that it had no jurisdiction to review the legality of appellant's detention in the military service of the United States when and where he is being detained contrary to and in violation of the provisions of 46 *USCA*, sec. 225, Chapter 11, because appellant had not taken the administrative appeals provided by the Selective Service Act.

V.

Summary of Argument.

I.

A draftee who has undergone induction into the military service, may by *habeas corpus* proceedings, obtain a judicial review of the legality of his classification and induction on the grounds that his local draft board acted in excess of its jurisdiction, arbitrarily, and in violation of due process of law, even though prior to his induction the draftee failed to take an administrative appeal from his classification by the local board.

II.

A draftee who has undergone induction into the military service, may by *habeas corpus* proceedings, obtain a judicial review of the legality of his classification and induction on the grounds that such classification and induction were in violation of the provisions of 46 USCA, sec. 225, Chapter 11, even though prior to his induction the draftee failed to take an administrative appeal from his classification by the local board.

III.

A draftee who has undergone induction into the military service, may by *habeas corpus*, obtain a judicial review of the legality of his detention in the military service of the United States on the grounds that he is being detained contrary to and in violation of the provisions of 46 USCA, sec. 225, Chapter 11, even though prior to his induction the draftee failed to take an administrative appeal from his classification by the local board.

VI.
ARGUMENT.

I.

A Draftee Who Has Undergone Induction Into the Military Service, May by Habeas Corpus Proceedings, Obtain a Judicial Review of the Legality of His Classification and Induction on the Grounds That His Local Draft Board Acted in Excess of Its Jurisdiction, Arbitrarily, and in Violation of Due Process of Law, Even Though Prior to His Induction the Draftee Failed to Take an Administrative Appeal From His Classification by the Local Board.

It is conceded appellant failed to take any of the administrative appeals provided by the Selective Service Act and the Regulations issued pursuant thereto. However, appellant contends this is immaterial. Since he had undergone actual induction into the military service, questions of procedure under the Selective Service Act and the Selective Service Regulations issued pursuant thereto are thereby avoided, and appellant may by *habeas corpus* proceedings challenge the legality of his classification and induction, particularly where the challenge is made on jurisdictional and constitutional grounds.

The sole question therefore presented by this appeal is whether appellant who had not taken an administrative appeal from his classification by the local board, but had undergone actual induction into the military service, may by *habeas corpus* proceedings, obtain a judicial review of the legality of his classification and induction.

The mobilization system which Congress established by the Selective Service Act of 1948, is designed to operate as one continuous process for the selection of men for national service. After the initial steps in the process had been taken the registrant is classified in accordance with the standards contained in the Act and the Selective Service Regulations. The local board then notifies him of his classification. The registrant may contest his classification by a personal appearance before the local board, and if that board refuses to alter the classification, by carrying his case to a board of appeal, and thence, in certain circumstances, to the President. But a registrant is not required under the Act and Regulations to take the administrative appeals. He may waive or abandon it; and if he does he has exhausted those particular intermediate steps in the Selective Service procedure, and only after he has exhausted those particular steps, either by waiver or abandonment, or by pursuing the remedy to the very end, is a protesting registrant ordered to report for service. When he is ordered to report for service the registrant must obey the order, and but such order is not the equivalent of acceptance for service. The connected series of steps in the Selective Service process does not end until the registrant is finally accepted for service.

When a registrant has been finally accepted for military service, but refuses to submit to induction, in a criminal action for refusing to submit to induction, the registrant is entitled to judicial review of the propriety of his classification by the local board even though he failed to take

an administrative appeal from said classification. The following cases, in appellants' opinion, support the views herein expressed:

Falbo v. United States, 320 U. S. 549;

Billings v. Truesdell, 321 U. S. 542;

Estep v. United States, 327 U. S. 114;

Gibson v. United States, 329 U. S. 338;

United States v. Downer, 135 F. 2d 521.

In *Falbo v. United States*, *supra*, pages 550, 554, Falbo was criminally charged with having wilfully failed to obey the board's order to report. The court held:

“ . . . Congress was not required to provide for judicial intervention before final acceptance of an individual for national service”

In *Billings v. Truesdell*, *supra*, pages 545, 558, Billings filed a petition for a writ of *habeas corpus* alleging he was not actually inducted in the service and that he was amenable to the civil laws of the United States and not subject to military jurisdiction. The court held:

“* * * Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. But we can hardly say that he must report to the military in order to exhaust his administrative remedies,”

In *Estep v. United States*, *supra*, pages 115-116, Estep reported for induction, was finally accepted, but refused to submit to induction. The court said:

“We found no provision for judicial review of a registrant’s classification prior to the time when he had taken all the steps in the selective process and had been finally accepted by the armed services;

“*Falbo v. United States*, *supra*, does not preclude such a defense in the present cases. In the *Falbo* case the defendant challenged the order of the local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remedies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them;”

In the present case appellant was not only accepted for service, but that also he has undergone actual induction into the military service. The orders of the local board have been satisfied, and there are no further steps in the Selective Service process which he can take to obtain relief from them. Appellant contends that he has exhausted the Selective Service procedure even though he had waived the intermediate step of an administrative appeal, and he is therefore entitled to judicial review of the propriety of his classification by the local board and of the legality of his induction.

Furthermore, since appellant has undergone actual induction, questions of exhaustion of Selective Service procedure such as have arisen in the *Falbo*, *Estep* and *Gibson* cases are here avoided, and appellant may by *habeas corpus* proceedings obtain a judicial review of the legality of his classification and induction.

In *Estep v. United States*, *supra*, pages 123-124, the court said:

“The remedy of *habeas corpus* extends to a case where a person is in custody in violation of the Constitution or of a law . . . of the United States . . . R. S. sec. 753, 28 United States Code, sec. 453. It has been assumed that *habeas corpus* is available only after a registrant has been inducted into the armed services.”

In *Gibson v. United States*, *supra*, pages 359-360, the court said: “It has been clearly established that the remedy by way of *habeas corpus* is open to the wrongfully inducted member of the armed forces to secure his release.” (Consult cases cited in notes 23, 24, 36.)

In *United States v. Downer*, *supra*, page 522, the court said:

“Since the draftee has, therefore, obeyed the law by responding to the call for induction and has relied upon the writ of *habeas corpus* to test his legal rights, questions of procedure such as have arisen in cases of a similar nature are here avoided and he has placed himself in the proper position to challenge the legality of his induction.”

Even if it be assumed for purposes of argument appellant may not obtain a judicial review of the propriety of his classification by *habeas corpus* proceedings because he had not taken the administrative appeal from his classification (which, of course, appellant does not concede) such questions of Selective Service procedure are avoided where appellant, after having undergone actual induction,

In *Estep v. United States*, *supra*, pages 115-116, Estep reported for induction, was finally accepted, but refused to submit to induction. The court said:

“We found no provision for judicial review of a registrant’s classification prior to the time when he had taken all the steps in the selective process and had been finally accepted by the armed services;

“*Falbo v. United States*, *supra*, does not preclude such a defense in the present cases. In the *Falbo* case the defendant challenged the order of the local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remedies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them;”

In the present case appellant was not only accepted for service, but that also he has undergone actual induction into the military service. The orders of the local board have been satisfied, and there are no further steps in the Selective Service process which he can take to obtain relief from them. Appellant contends that he has exhausted the Selective Service procedure even though he had waived the intermediate step of an administrative appeal, and he is therefore entitled to judicial review of the propriety of his classification by the local board and of the legality of his induction.

Furthermore, since appellant has undergone actual induction, questions of exhaustion of Selective Service procedure such as have arisen in the *Falbo*, *Estep* and *Gibson* cases are here avoided, and appellant may by *habeas corpus* proceedings obtain a judicial review of the legality of his classification and induction.

In *Estep v. United States*, *supra*, pages 123-124, the court said:

“The remedy of *habeas corpus* extends to a case where a person is in custody in violation of the Constitution or of a law . . . of the United States . . . R. S. sec. 753, 28 United States Code, sec. 453. It has been assumed that *habeas corpus* is available only after a registrant has been inducted into the armed services.”

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In *United States v. Downer*, *supra*, page 522, the court said:

“Since the draftee has, therefore, obeyed the law by responding to the call for induction and has relied upon the writ of *habeas corpus* to test his legal rights, questions of procedure such as have arisen in cases of a similar nature are here avoided and he has placed himself in the proper position to challenge the legality of his induction.”

Even if it be assumed for purposes of argument appellant may not obtain a judicial review of the propriety of his classification by *habeas corpus* proceedings because he had not taken the administrative appeal from his classification (which, of course, appellant does not concede) such questions of Selective Service procedure are avoided where appellant, after having undergone actual induction,

by *habeas corpus* proceedings, challenges the legality of his classification and induction on jurisdictional and constitutional grounds.

In *Estep v. United States*, *supra*, page 123, the court said:

“The remedy of *habeas corpus* extends to a case where a person is in custody in violation of the Constitution or of a law . . . of the United States . . . R. S. sec. 753, 28 United States Code, sec. 453.”

In *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 39 S. Ct. 375, 377, 63 L. Ed. 772, the Interstate Commerce Commission had issued a rate order which the plaintiff attacked as lacking a statutory authority. It was there contended that plaintiff should have sought administrative review. The court said, “But plaintiff does not contend that 75 cents is an unreasonably high rate, or that it is discriminatory, or that there was mere error in the action of the commission. The contention is that the commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the commission.”

Consult the following cases to the same effect:

Koepke v. Fontecchio, 177 F. 2d 125, 128;

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 107-110;

Gegiow v. Uhl, 239 U. S. 3, 9;

Stark v. Wickard, 321 U. S. 288, 307-311;

Ng Fung Ho v. White, 259 U. S. 276, 284.

II.

A Draftee Who Has Undergone Induction Into the Military Service, May by Habeas Corpus Proceedings, Obtain a Judicial Review of the Legality of His Classification and Induction on the Grounds That Such Classification and Induction Were in Violation of the Provisions of 46 USCA, Sec. 225, Chapter 11, Even Though Prior to His Induction the Draftee Failed to Take an Administrative Appeal From His Classification by the Local Board.

46 *USCA*, sec. 225, Chapter 11, provides, among other things, that “No . . . engineer of steam vessels, licensed under this chapter shall be liable to draft in time of war except for the performance of duties such as required by his license.”

In the District Court appellee argued that the above section was suspended by Section 17 of the Selective Service Act of 1948 (50 *United States Code, War Appendix*, sec. 467), and that the Selective Service Act of 1948 (50 *USCA*, sec. 454(a)) provides no authority for appellant’s deferment or exemption. This argument was on the merits and this question is, therefore, not before the court.

The sole question presented by this appeal under this argument is whether appellant who had not taken the administrative appeal from his classification before he was inducted into the service, may, after his induction, by *habeas corpus* proceedings, obtain judicial review of the legality of his classification and induction, particularly on jurisdictional and constitutional grounds. And appellant’s argument hereunder will be limited to this question.

In this argument the issue is solely one which involves an interpretation of 46 *USCA*, sec. 225, Chapter 11, with the Selective Service Act of 1948. As 46 *USCA*, sec. 225, Chapter 11, specifically exempts appellant from draft in time of war except for the performance of duties such as required by his license, it was self-executing. The Selective Service Director, its officers and draft board members had announced their interpretation of 46 *USCA*, sec. 225, Chapter 11, with respect to the Selective Service Act of 1948, and they still insist upon it here [Tr. pp. 12, 13, 20, 23-26].

In appellant's opinion the Selective Service regulations have no bearing upon the issue here presented, and also in appellant's opinion the Selective Service Act of 1948 provides no administrative remedy where the question is, as here, a question of exemption from draft in time of war except for the performance of duties such as required by his license. Therefore an attempt to secure relief by resort to the so-called administrative remedies would clearly have been futile.

Koepke v. Fontecchio, supra;

Skinner & Eddy Corp. v. United States, supra.

Appellants also refer to their Argument I, above, and by reference make it a part of their argument hereunder.

In view of the foregoing the District Court erred in concluding that it had no jurisdiction to review the draft board's findings and order of induction because appellant had not taken the administrative appeal from his classification by the local board.

III.

A Draftee Who Has Undergone Induction Into the Military Service, May by Habeas Corpus Proceedings, Obtain a Judicial Review of the Legality of His Detention in the Military Service of the United States on the Grounds That He Is Being Detained Contrary to and in Violation of the Provisions of 46 USCA, Sec. 225, Chapter 11, Even Though Prior to His Induction the Draftee Failed to Take an Administrative Appeal From His Classification by the Local Board.

Assuming, but not conceding, that under the Selective Service Act of 1948, and the Selective Service Regulations, no authority exists for drafting appellant in time of war "for the performance of duties such as required by his license." In such case the controversy would not be between appellant and the local board, but the issue would be solely one between appellant and the military authorities.

The question then is whether appellant is being illegally detained in the military service of the United States because he is not performing duties such as required by his license and not receiving the highest rate of wages paid in the Merchant Marine of the United States for similar services, as provided by 46 USCA, sec. 225, Chapter 11.

Manifestly, the Selective Service Regulations have no bearing upon the issue here presented and the Selective Service Act provides no administrative remedy in a situation such as this.

Koepke v. Fontecchio, supra;

Skinner & Eddy Corp. v. United States, supra.

Appellants also refer to their Arguments I and II, above, and by reference makes them a part of their argument hereunder.

In view of the foregoing the District Court erred in concluding that it had no jurisdiction to review the draft board's findings and order of induction because appellant had not taken the administrative appeal from his classification by the local board.

VII. Conclusion.

Appellants respectfully submit for the reasons given hereinabove, as follows:

1. Appellant who has undergone induction, may by *habeas corpus* proceedings, obtain judicial review of the legality of his classification and induction on jurisdictional and constitutional grounds even though prior to his induction he failed to take an administrative appeal from his classification.

2. The issue under Argument II is solely one which involves an interpretation of 46 *USCA*, sec. 225, Chapter 11, with respect to the Selective Service Act of 1948; the Selective Service Regulations have no bearing upon the issue herein presented; and the Selective Service Act of 1948 provides no administrative remedy in a situation such as this.

3. The issue under Argument III is solely one between appellant and the Military Authorities of the United States, and not between appellant and the local board; the Selective Service Regulations have no bearing upon the issue herein presented; and the Selective Service Act of 1948 provides no administrative remedy in a situation such as this.

Respectfully submitted,

NICOLAS FERRARA,

Attorney for Appellants.

No. 13056

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. PAUL OLINGER and RUTH HUFFMAN,

Appellants,

vs.

FRANK H. PARTRIDGE, Brigadier General, United States
of America, Commanding General, Camp Roberts, Cali-
fornia,

Appellee.

APPELLEE'S BRIEF.

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DEC 26 1951

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Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

This is a habeas corpus proceeding before United States District Judge Harry C. Westover, whose final order shall be subject to review on appeal by the Court of Appeals for the Circuit where the proceeding is had. (28 U. S. Code, Sec. 2253.)

Statement of Facts.

Appellant was classified 1-A by Local Selective Service Board No. 126, Long Beach, California, on October 8, 1948. On October 11, 1948, Selective Service System Form No. 110 was mailed to said appellant, advising him that he had been classified 1-A and further notifying him

of his right to appeal said classification. [Tr. pp. 13, 14, 16, 22 and 23.] During the years 1948 and 1949 appellant made no effort to appear and discuss his classification with the draft board, to present new information, or to discuss his classification on the basis of information already on file. [Tr. p. 14.] Appellant did not take any appeal nor file any oral or written request for personal appearance before the local board [Tr. p. 19], nor did he submit any facts or new information, which, if true, would justify a change in his classification. No request for occupational deferment by any employer of registrant has ever been made. [Tr. pp. 19 and 20.]

After appellant was notified to report for physical examination in August of 1950, appellant first appeared personally at the local board. [Tr. p. 19.]

Appellant failed to report for his physical examination on August 15, 1950, and failed to report for his induction on September 18, 1950. [Tr. pp. 19 and 20.]

After appellant was contacted by an agent of the Federal Bureau of Investigation, arrangements were made to process said appellant as a delinquent, and on February 6, 1951, appellant was inducted into the Army of the United States. [Tr. p. 21.]

The matter came on regularly for hearing on an order to show cause on a writ of habeas corpus why a writ should not issue on April 16, 1951, and on June 4, 1951, the Honorable Harry C. Westover, Judge of the United States District Court, dismissed said petition for a writ of habeas corpus for lack of jurisdiction.

Question Presented on Appeal.

May the District Court review the legality of appellant's classification and induction where the appellant, during the lapse of almost two years between the date of his classification and the date of his induction, has taken no appeal, has made no timely request for personal appearance, nor any proper administrative act seeking a review of his classification?

To state the question in another way, may a registrant who, having been classified and selected for service and training, has exhausted none of the remedies allowed him under the Act and has undergone induction into the military service, by habeas corpus proceeding obtain a judicial determination of the legality of his induction?

ARGUMENT.

1. Appellant Having Failed to Exhaust His Administrative Remedies Within the Selective Service Act May Not Now Seek a Judicial Review of the Action of the Board.

Appellant in his opening brief, at page 9, has conceded that he failed to take any of the administrative appeals provided by the Selective Service Act and the regulations issued pursuant thereto.

It is a fundamental rule of law that administrative remedies must be exhausted before judicial review will be permitted, and with regard to the Selective Service Act it is fundamental that for habeas corpus to lie it must first appear that the registrant has exhausted his administrative remedies under the Act.

This specific point has been decided directly many times, and the leading case in support of this rule is that of *Johnson v. United States*, 126 F. 2d 242, 8 Cir. 1942, wherein the Court states, at page 247:

“* * * Courts can prevent arbitrary action of such agencies from being effective. But a registrant cannot come to a court for such relief until he has exhausted all available and sufficient administrative remedies for such arbitrary action. Appellant has not availed himself of such corrective administrative relief. He has no standing in a court to complain and the court cannot examine the arbitrariness of his classification by the local board.”

The Sixth Circuit Court of Appeals, in 1942, in *Rase v. United States*, 129 F. 2d 204, cites the *Johnson* case with approval. And the Ninth Circuit, in *Crutchfield v. United States*, 142 F. 2d 170, at page 174, (1943), in an Opinion by Judge Wilbur, quotes with approval the language from *Johnson v. United States*, *supra*, quoted above.

The case of *McLenigan v. Grymes*, 59 F. Supp. 846, is cited as authority for the holding that if habeas corpus is to lie in favor of Army inductee seeking release from the Army on the ground of the local board's lack of jurisdiction over him, it must appear that he has exhausted his administrative remedies under the Selective Service Act. The Court states, at page 847:

“* * * Well over four years passed between the date of petitioner's registration and the date of his induction and there is no record or evidence of any appeal to the Selective Service Board of Appeal or objection to the jurisdiction of Local Board No. 8 in Baltimore until March 1945, when this Court was requested to intervene. It is fundamental that for habeas corpus to lie ‘it must first appear that the registrant has exhausted his administrative remedies under the Act.’ * * *”

The *Rase* and *Johnson* cases, *supra*, are cited with approval.

And the case of *Cox v. Fredericks, et al.*, 90 F. Supp. 55, 9 Cir. 1950, is in accord, and the Court therein states, at page 58:

“* * * It has been pointed out in previous decisions that before a draftee may attack the validity of an induction order he must exhaust his admin-

istrative remedies, that is, he must take the appeals provided for either by the statute or regulations.
* * *

The Selective Service Act of 1948 states:

“If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege.”

Sec. 10, Pub. Law 759, 80 Cong., (Title 32
C. F. R., Sec. 1641.2(b).

Supporting this regulation is the decision of Judge Swan of the Second Circuit in the case of *United States ex rel. La Charity v. Commanding Officer*, 142 F. 2d 381, (1944), at page 382, whose ruling, while applying to the Selective Training and Service Act of 1940, is equally applicable in the instant case.

It is obvious, therefore, that a prerequisite to seeking a writ of habeas corpus, to review within the strict limitations laid down, the legality of the acts of a Selective Service Board, is exhaustion of the administrative remedies provided for by the statute or regulations, and appellant having failed to exhaust his administrative remedies—in fact having waived the right to do so, the Court is without jurisdiction to hear the petition for a writ.

That this rule is general appears from the language universally used in cases pertaining thereto (though not deciding this specific point). For example, in *United States v. Commanding Officer*, 58 F. Supp. 933 (1945), the Court states, at page 939:

“* * * a registrant who, having been classified and selected for service and training, *has exhausted*

the remedies allowed him under the act and has undergone induction into the military service, may, by appropriate Habeas Corpus proceedings, obtain a judicial determination of the legality of his induction * * *.” (Emphasis added.)

Again, in the same case, the Court uses the following language at page 939:

“In the instant case it is manifest, and unquestioned, that the complainant seasonably exhausted the remedies accorded to him under the Selective Training and Service Act of 1940, as amended; that he appealed from his classification by the local board to the board of appeals, * * *”

It is further interesting to note that in each of the cases cited by the appellant in his opening brief, on page 11, that each of the registrants in the *Falbo*, *Billings*, *Estep*, *Gibson* and *Downer* cases exhausted their administrative remedies *within* the Selective Service Act. The language of the Supreme Court in *Estep v. United States*, 327 U. S. 114, at page 115, is significant. The Court states:

“* * * We found no provision for judicial review of a registrant’s classification prior to the time when he *had taken all the steps in the selective process* AND *had been finally accepted by the armed services*. * * *” (Emphasis added.)

You will note that the Court uses the conjunctive “and,” making it amply clear that induction into the armed services is a separate step which does not eliminate the necessity of having “taken all the steps in the selective process.”

We have no quarrel with appellant's citation on page 11 of his opening brief from *Billings v. Truesdell*, 321 U. S. 542, where, at page 558, in the Opinion of Mr. Justice Douglas, it is stated:

“* * * Moreover, it should be remembered that he who reports at the induction station is following procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. * * *”

Note that Mr. *Billings* took all the appeals provided for in the Selective Service Act. Note, too, that the Court, in referring to administrative remedies, uses “remedies” in its plural form.

Falbo v. United States, 320 U. S. 549, cited by appellant, also contains significant language at page 552:

“* * * Selection of registrants for service, *and deferments or exemptions from service*, are to be effected *within the framework* of this machinery as implemented by rules and regulations prescribed by the President. * * *” (Emphasis added.)

It may be said, then, that Congress did not intend that the Courts should grant exemptions and deferments, but that it should be effected “within the framework” of the Selective Service Act. It would thus appear that the appellant desired that the Courts should determine his right to deferment rather than the lawfully constituted administrative body and, hence, he has attempted to by-pass

the machinery "within the framework" to seek his exemption from military service.

Appellant, however, contends that the mere induction satisfies questions of exhaustion of Selective Service procedure, but appellant has pointed to no case where the Court has reviewed the legality of the classification of an inducted registrant wherein all administrative appeals within the Act were not taken.

How necessary it is to have taken the appeals provided for by the Act, if one is to complain of the action of the board, is demonstrated by the language of Mr. Justice Rutledge in his concurring opinion in *Falbo v. United States, supra*, at page 555, wherein he states:

"* * * Petitioner claims the local board's order of classification was invalid because that board refused to classify petitioner as a minister on the basis of an antipathy to the religious sect of which he is a member. And, if the question were open, the record discloses that some evidence tendered to sustain this charge was excluded in the trial court. *But petitioner has made no such charge concerning the action of the appeal board which reviewed and affirmed the local board's order.* And there is nothing to show that the appeal board acted otherwise than according to law. *If therefore the local board's order was invalid originally for the reason claimed, as to which I express no opinion, whatever defect may have existed was cured by the appeal board's action.* * * *" (Emphasis added.)

That the exhaustion of administrative remedies means actually taking the appeals provided for by the Act is further evident from the language of the Supreme Court in the case of *Sunal v. Large*, 332 U. S. 174, (1947), in which Mr. Justice Douglas states, at page 175:

“* * * The local boards, after proceedings unnecessary to relate here, denied the claimed exemptions and classified these registrants as 1-A. *They exhausted their administrative remedies but were unable to effect a change in their classification.* * * *”
(Emphasis added.)

In the *Sunal* case, *supra*, the appellants sought a writ of habeas corpus instead of appealing from conviction by the trial court for refusing to submit for induction. The Court states at page 181:

“* * * But since they chose not to pursue the remedy which they had, we do not think they should not be allowed to justify their failure by saying they deemed any appeal futile.”

This language is readily applicable to appellant's position in the instant case.

Of the cases cited by the appellant on page 14 in his opening brief, your appellee finds none that is in point. *Koepke v. Fontecchio*, 177 F. 2d 125, holds at page 128 that plaintiff could maintain action for declaratory judgment *as no administrative remedy was provided under the Act.*

Skinner & Eddy Corp. v. United States, 249 U. S. 557, is an injunction suit seeking to enjoin the enforcement of an order which the plaintiffs contend the Interstate Commerce Commission had no statutory authority to issue, and *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, is another injunction suit wherein no administrative appeal was provided. *Gegiow v. Uhl*, 239 U. S. 3, is an immigration case which had been administratively appealed, while *Stark v. Wickard*, 321 U. S. 288, distinguishes itself by the following quotation at page 309:

“* * * Here, there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, *at any rate in the absence of an administrative remedy*, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. * * *” (Emphasis added.)

2. Answering Contentions of Appellant Concerning Provisions of 46 U. S. C. A. Section 225.

Appellant throughout his brief has placed great reliance upon the provisions of 46 U. S. C. A., Section 225, which states:

“No * * * engineer of steam vessels, licensed under this chapter shall be liable to draft in *time of war* except for the performance of duties such as required by his license; * * *” (Emphasis added.)

Appellant states that his being drafted in face of this Section is such unlawful and arbitrary action upon the part of the board that it eliminates the necessity of his having taken appeals administratively and renders the matter one immediately qualified for judicial review by reason of the board having exceeded its statutory powers. Appellee contends that the District Court could and probably did take judicial notice of the fact that 46 U. S. C. A. Section 225, was specifically repealed by a joint resolution of Congress on July 25, 1947, (61 Stat. 451), which states:

“In the interpretation of the following statutory provisions [referring specifically to 46 U. S. C. A., Section 225], the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress of the National Emergency proclaimed by the President on September 8, 1939, and May 27, 1941.”

Congress thereby evidences its intent that said Section apply *only in time of war* in accordance with a reasonable

reading of the language thereof, and further has by a joint resolution declared that as far as that statute is concerned the *war is terminated*.

And, going one step further, the Selective Service Act of 1948 specifically states that "except as provided in this Title, all laws and parts of laws in conflict with the provisions of this Title are hereby suspended to the extent of such conflict for the period in which this Title shall be in force." 62 Stat. 625, amended June 23, 1950, 64 Stat. 254-318, (50 U. S. C. A. Supp., 467). The above quoted section becomes even more pertinent in view of Section 4 of the Selective Service Act of 1948, which states, in effect, that except as otherwise provided in this Title, every male citizen of the United States who is between the ages of nineteen and twenty-six at the time fixed for his registration, shall be liable for training and service in the armed forces of the United States. Since there is nothing in the Act exempting licensed engineers in the merchant marine, it follows that Section 4 by implication repeals the Section in Title 46, referred to above. Hence, the statute upon which registrant relies to indicate to the Court that the draft board has exceeded its jurisdiction and, hence, appellant should be given a judicial review of his classification, has been (1) in effect, repealed, and (2) superseded, and as to how far an Act of Congress may go in superseding the previous Act, the cases have held that even in the case of a treaty with Indian nations wherein the treaty stated that the Indians would not be subject to call for military service, the Draft Act of 1940 superseded these treaties.

Totus v. United States, 39 F. Supp. 7, 11;

United States v. Claus, 63 F. Supp. 433, 434.

3. Summary.

Thus, we have two facets to the case, neither of which the District Court felt warranted the taking of jurisdiction, (1) the allegations in the petition for a writ, alleging lack of due process and arbitrary and capricious action on the part of the board, which is not subject to judicial review by reason of the appellant's failure to take the administrative remedies open to him, and (2) the reliance by appellant upon 46 U. S. C. A., Section 225, to show that the board exceeded its authority in drafting the appellant in the face of said Section, where it appears upon the face of appellant's petition that he relies upon a statute that has been (a) repealed and (b) superseded.

Conclusion.

In view of the foregoing, it is respectfully submitted that should this Court determine that the District Court had jurisdiction to judicially review the appellant's classification, then the false premise upon which the appellant relies, to wit, 46 U. S. C. A., Section 225, will not alter the ultimate result achieved by the District Court's dismissal of the petition for a writ of habeas corpus, and it is, therefore, urged that the judgment of the District Court be affirmed.

Respectfully submitted,

WALTER S. BINNS,
United States Attorney,
CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division,
ROBERT K. GREAN,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 13057

United States
Court of Appeals
For the Ninth Circuit.

JAMES C. GIBBS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Apostles on Appeal

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

OCT 2 - 1951

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

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Proctors for Appellant.

CHAUNCEY F. TRAMUTOLO,

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Proctors for Appellee.

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 25255-G

JAMES C. GIBBS,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

LIBEL IN PERSONAM

(By Amendment of Complaint)

To the Honorable the Judges of the Above-Entitled
Court:

The libel of James C. Gibbs on the U.S.S. An-
tietam, owned, managed, operated and navigated
by the United States of America, against said
owner and against all persons lawfully intervening
in its interests, in a cause of action for damages
under the Public Vessels Act, 46 U.S.C.A., alleges:

I.

That the libelant is a resident of Redwood City
in the County of San Mateo, State of California, and
resides therefore within the jurisdiction of the
above-entitled court.

II.

That the respondent, United States of America,
is a sovereign nation and a political entity that has
consented to be sued by certain persons, and that
such consent is found and contained in and granted

by the Public Vessels Act in 46 U.S.C.A., sections 781 et seq.

III.

That libelant was during all the times herein mentioned, an employee of the respondent, assigned to and employed in an executive branch of the said respondent, to wit: the Navy Department, as a first class shipfitter, and is, pursuant to the rules of the respondent above named, a permanent employee of said respondent. That said libelant alleges the fact to be that he is a person within the coverage of the said Public Vessels Act and is covered and protected by and within the terms of the said Act.

IV.

That prior to November 19, 1946, libelant was duly assigned to the performance of work upon an aircraft carrier of the respondent above named, known and called the U.S.S. Antietam, at the San Francisco Naval Shipyard, Hunters Point, San Francisco, California. That the said San Francisco Naval Shipyard is an installation of the Navy Department, one of the executive branches of the respondent above named, and that the said U.S.S. Antietam, said aircraft carrier, is wholly owned, operated, managed and navigated by and the property of and in the exclusive possession of the said respondent above named and that the said aircraft carrier, U.S.S. Antietam, and the work then and there being performed upon it and to which libelant was then and there assigned by the said respondent, was wholly and exclusively within the control and under the direction of the said respondent.

V.

That in accordance with orders and the assignment of this libelant as such employee of the respondent, this libelant was on said November 19, 1946, engaged upon said aircraft carrier *Antietam* in the performance of work and repairs assigned to him as the duties of such employee as hereinabove alleged. That while thus engaged, and at or about the hour of 10:15 a.m. of said day, and as a result of the carelessness and negligence of the said respondent, an explosion occurred upon said aircraft carrier, and that this libelant then and there, and as a result of the said carelessness and negligence of said respondent received the following personal injuries: fracture of the left scapula, severe burns of the back, numerous bruises and abrasions of the head, hands and shins, profound shock, pain and suffering and other injuries not presently diagnosed.

VI.

That libelant is advised and believes, and therefore alleges, that his health and physical capacity have been permanently injured. That solely by reason of the premises and as a proximate result thereof, libelant has required hospitalization and surgical attention for the purpose of effecting a cure of said libelant's condition, to his special damage in a presently unascertained amount, and libelant, in this respect, alleges that the injuries will be permanent in nature and that he will be permanently disabled; libelant prays leave to amend this allegation when the facts are more particularly ascertained.

VII.

That as a result of the negligence and the carelessness of the said respondents and the injuries received by this libelant, libelant has been generally damaged in the amount of Sixty Thousand Dollars (\$60,000.00).

VIII.

That all and singular the allegations herein are true and are within the admiralty and maritime jurisdiction of the above-entitled court.

Wherefore, libelant prays that process in due form of law, according to the course of this Honorable Court and in causes of admiralty and maritime jurisdiction, may issue against said respondents, and that citation in personam may issue against respondents, and that respondents be cited and required to appear and answer, upon oath, all and singular, the matters aforesaid; and that this Honorable Court may be pleased to decree the payment by respondents to libelant of the sum of Sixty Thousand Dollars (\$60,000.00), plus special damages to be alleged, plus costs of suit herein, and such other and further relief as to the court may seem meet and proper.

/s/ MELVIN M. BELL,

/s/ LOU ASHE,

Proctors for Libelant.

State of California,

City and County of San Francisco—ss.

James C. Gibbs, being first duly sworn, deposes and says: That he is the libelant in the above-en-

titled action; that he has read the foregoing Libel in Personam (By Amendment of Complaint) and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated upon information and belief, and as to those matters that he believes it to be true.

/s/ JAMES C. GIBBS.

Subscribed and sworn to before me this 13th day of September, 1948.

[Seal] /s/ MARGARET M. LYNCH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires Feb. 10, 1952.

[Endorsed]: Filed September 23, 1948.

[Title of District Court and Cause.]

ANSWER OF RESPONDENT
UNITED STATES OF AMERICA

Now comes the Respondent, United States of America, and answers the libel on file herein as follows:

I.

Respondent has no information or belief as to the alleged residence of the libelant and demands strict proof thereof.

II.

Respondent admits that respondent United States of America was and is a sovereign nation and a

political entity; denies that respondent United States of America has consented to be sued herein; denies that such consent is found and contained in and granted by the Public Vessels Act in 46 U.S.C. Sections 781 et seq.

III.

Respondent admits that libelant during the times mentioned in said libel was an employee of respondent United States of America, assigned to and employed in an executive branch of respondent, to wit, the Navy Department, and in this respect alleges that prior to the 19th day of November, 1946, libelant was employed by respondent United States of America as a first class shipfitter pursuant to Acts of Congress and regulations of the United States Civil Service Commission pertaining to the employment of civilian personnel by the Department of the Navy. Answering the allegation as to permanency of employment, respondent leaves matters of law for the Court's determination. Denies the remaining allegations of said Article III.

IV.

Respondent admits the allegations of Article IV.

V.

Answering Article V respondent admits that on November 19, 1946, Libelant, in accordance with orders and assignment as an employee of respondent, was engaged upon the said USS Antietam in the performance of work and repairs assigned to

him as the duties of such employee. Denies the remaining allegations of said Article V.

VI.

Respondent denies the allegations of Article VI.

VII.

Respondent denies the allegations of Article VII, and particularly that libelant was damaged in the sum of \$60,000.00 or any part thereof.

VIII.

Respondent denies the allegations of Article VIII.

As and for a Second, Separate and Distinct Defense to the libel on file herein respondent alleges:

I.

The United States District Court does not have jurisdiction under the Public Vessels Act of 1925 (46 U.S.C. 781) of a claim of damages for injuries by a Civil Service employee of respondent United States of America within the course and scope of his employment in the performance of work upon a public vessel of the United States of America, the United States of America not having consented to be sued for such a claim.

As and for a Third, Separate and Distinct Defense to the libel on file herein respondent alleges as follows:

I.

That libelant, as a Civil Service employee of respondent United States of America, as alleged

in the libel on file herein, was an officer of the United States of America, and the remedy of libelant is covered by the provisions of Title 5, U.S.C. 751 et seq., which said statute is exclusive in the remedy therein provided to libelant in the premises.

II.

That as a beneficiary under the provisions of Title 5, U.S.C. 751 et seq., libelant received medical treatment and has continued to receive medical treatment provided by the United States Marine Hospital, San Francisco, California; that as an employee of the United States libelant received payment in full for all accumulated sick and annual leave.

III.

That subsequent to said alleged injury libelant filed a claim with the Bureau of Employees Compensation of the Federal Security Agency for disability compensation as a result of said alleged injury; that said libelant was awarded disability compensation and received regular payments in accordance with said award.

IV.

That by virtue of libelant's claim and acceptance of compensation in accordance with the provisions of Title 5, U.S.C. section 751 et seq., libelant has elected his remedy thereunder and is barred from pursuing any other remedy that he might have had.

As and for a Fourth, Separate and Distinct Defense to the libel on file herein respondent alleges as follows:

I.

That at the time and place of the event alleged in the libel herein libelant so carelessly and negligently conducted himself that any or all of the matters and things set forth in said libel were solely and proximately the result of the carelessness and negligence of libelant in the premises; that none of the injuries or damages claimed to have been sustained by libelant was the result of any carelessness or negligence on the part of any of the officers, representatives, agents or employees of the United States of America, nor were the said alleged injuries or damages sustained by reason of any insufficiency or unseaworthiness on the part of said vessel.

Wherefore, Respondent prays that the libel filed herein be dismissed, and for its costs of suit and such other and further relief as to the Court may seem meet and proper.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant United States Attorney, Proctors for Respondent United States of America.

[Endorsed]: Filed July 5, 1949.

[Title of District Court and Cause.]

OPINION

Goodman, District Judge.

These seven consolidated cases are actions in tort against the United States. All of the libelants were shoreside civilian employees of the United States. On November 19, 1946, they were engaged in repairing the United States Aircraft Carrier Antietam, at San Francisco Naval Shipyard, Hunters Point. An explosion occurred and the libelants all suffered injuries.

Heretofore Judge Harris of this court decided that the actions could proceed under the Public Vessels Act, 43 Stat. 112, 46 USC 781 et seq. When the cases were called for trial, the Court, with the consent of all parties, proceeded to conduct a preliminary trial to determine whether or not the libelants had received and accepted compensation pursuant to the Federal Employees Compensation Act (hereinafter referred to as FECA) 39 Stat. 742, 5 USC 751 et seq. Witnesses testified in each of the cases as to applications for and receipt and acceptance of compensation by the libelants.

The evidence showed that six of the libelants received compensation for varying periods. One libelant, James C. Gibbs, received medical treatment and hospitalization, but no compensation.

Upon conclusion of the preliminary trial there were submitted to the court for decision the following issues:

1. Was the FECA the exclusive remedy of the libelants?

2. If it was not, was the receipt and acceptance of compensation an election of remedies on the part of libelants thus estopping them from maintaining tort actions against the United States?

Exclusiveness of Remedy

A study of the statutory system for compensating injured federal employees, as well as of the various statutes whereby the United States has consented to be sued for tort liability, and applicable decisions, is persuasive that, until the FECA was amended in 1949, it did not provide an exclusive remedy and did not prevent suits by employees of the United States under the Public Vessels Act.

Since the first federal employees compensation statute was adopted in 1908 up to the amendment of October 14, 1949, there has never been a provision in any of the compensation statutes or their amendments, either in form or effect, making the benefits thereof the exclusive remedy of federal employees. Footnoted is a chronological list of the statutes and their scope. *¹ (All footnotes are appended.)

It is equally true that in none of the statutes by which the United States has waived its sovereign immunity and consented to be sued, is there any provision making the benefits provided in the compensation statutes the exclusive remedy of federal employees. Footnoted is a chronological list of such statutes and their scope.*²

From a review of court decisions, it can be categorically stated that no federal court decision, other than the case of *Posey v. Tenn. Valley Authority*, 93 F. 2d 725 (5 Cir. 1937),*³ has ever held that the FECA affords the exclusive remedy to federal employees. To the contrary, it has been specifically held that the FECA does not bar suits by federal civilian employees against the Panama Railroad,*⁴ or against the United States under the Federal Control Act of 1918,*⁵ under the Suits in Admiralty Act;*⁶ under the Public Vessels Act*⁷ and under the Federal Tort Claims Act.*⁸

Indeed numerous suits by seamen injured on government merchant vessels have been allowed to proceed against the United States and the United States Shipping Board Fleet Corporation without any discussion of the effect of the FECA.*⁹ The Supreme Court itself appears to have taken it for granted that the FECA is not an exclusive remedy. This it has done in several cases, even though what it has said may be characterized as dicta. Yet its reiteration, if it be dicta, is, to say the least, cumulatively persuasive.*¹⁰

It is true that there are three cases in the second Circuit denying naval personnel the right to sue under the Public Vessels Act.*¹¹ But those cases are, at best, merely analogous in that the remedy they hold to be the exclusive remedy available to naval personnel is that provided by the veterans' pension laws and not that accorded by the FECA.*¹² Moreover, the validity of those decisions is now extremely doubtful in view of the Supreme Court's

holding in *Brooks v. United States*, 337 U.S. 49 (1949) that there is nothing in "the veterans' laws which provides for exclusiveness of remedy" so as to bar a suit by a serviceman under the Federal Tort Claims Act.*¹³ The support which the Second Circuit purported to find for these decisions in the Clarification Act of 1943 (57 Stat. 45, 50 USCA App. 1291-1296) is somewhat illusory. The Court stated that the provision of that Act excluding seamen employed through the War Shipping Administration from the benefits of the FECA showed that the Congress did not expect those in its service upon public vessels to enjoy at once the privilege of compensation and the right to sue for damages. Even were the Congressional policy expressed in the Clarification Act accepted as a proper guide to the legislative intent of a previous Congress, the policy behind the special treatment of War Shipping Administration seamen was not that deduced by the Circuit Court. The Committee Reports on the Act*¹⁴ clearly demonstrate that the Congress was motivated by the desire to equate the rights of War Shipping Administration seamen and seamen privately employed, rather than by any feeling that all employees on public vessels should be limited to a single remedy.

It has been argued by the Government that Section 9 of the Public Vessels Act, 46 USC 789*¹⁵ limits libelants to their remedy under the FECA, because a private employer would not be liable to suit inasmuch as the Longshoremen and Harbor Workers' Compensation Act (44 Stat. 1424, 33 USC

901 et seq.) is made the exclusive remedy of employees against private employers. I see no reason for prolonging this opinion by a discussion of this argument. In my opinion the argument is not meritorious.

On October 14, 1949, the Congress added subsection b to Section 7 of the FECA, 5 USC 757, and there provided specifically and clearly that the Act was the exclusive remedy of all employees of the United States except the masters or members of the crew of vessels. (Public Law 357 81st Cong., 1st Sess.). The issue of exclusiveness of remedy therefore is no longer precedentially significant. The 1949 amendments may be said to have some argumentative weight as indicative of Congressional awareness that up to that time the compensation statute was not the exclusive remedy of employees; or, to say the least, that there was grave doubt in the matter.

It is my conclusion that the compensation statute was not the exclusive remedy of the libelants in these cases.

Election of Remedies

There has been almost uniform approval, in the authorities, of the rule that acceptance of compensation under the compensation statute, in the absence of coercion or other improper influence, is a bar to tort suits against the United States for damages. The cases so holding are footnoted.*¹⁶

The evidence in all of the consolidated cases, except that of Gibbs, is clear and convincing that the

libelants applied for and periodically received compensation under the statute. The evidence shows that some, if not all of the six libelants, other than Gibbs, suffered serious burns and injuries in the Antietam explosion. These men were immediately hospitalized and received medical attention. The employees of the Compensation Commission prepared all the necessary papers for the injured men and cooperated in every way to secure the prompt payment to them of their compensation payments. The evidence shows, and it is my conclusion, that all six men were fully aware that they were receiving compensation under the compensation statute. It was suggested and argued by counsel for libelants that some duty rested upon the employees of the Compensation Commission to advise libelants that they might have a right of action against the United States in tort for damages. There is no basis in law or in fair dealing for such a duty. To the contrary, it was the conscientious duty of the employees of the United States, administering the compensation statute, in the circumstances of this case, to see to it that the injured men were assisted in every way to promptly and regularly receive the compensation to which they were entitled. It is my opinion and finding that the libelants uncoercedly received and accepted compensation under the compensation statute. There is not the slightest evidence to sustain the claim that the acceptance of compensation was either not free or was coerced.

It is contended by libelants the making of claims for and acceptance of compensation under the

statute is not sufficient to constitute an election without a final award by the Commission. This argument is invalid. See *Frader v. U.S.* supra., footnote 16.

The cases of all the libelants except Gibbs will therefore be dismissed upon the ground that the libelants are barred from maintaining the actions because they have elected their remedy under the FECA. Findings should be submitted accordingly.

The case of *Gibbs v. United States* poses a somewhat different problem. Gibbs received certain benefits under the FECA, namely, medical and hospital attention. He did not apply for nor did he receive any compensation payments. The court will reserve ruling on the question as to whether or not there has been an election of remedies in his case. His case will be set for further trial on December 19, 1950, for the purpose of hearing further evidence on the issue of election of remedies and also on the merits as to the liability of the United States.

Dated: November 29, 1950.

FOOTNOTES

^{*1}Act of May 30, 1908, 35 Stat. 556 (covered workmen in manufacturing establishments, arsenals, or navy-yards, or engaged in the construction of rivers and harbor fortifications or in hazardous work under the Isthmian Canal Commission or on reclamation projects);

Act of March 11, 1912, 37 Stat. 74 (extended the 1908 Act to employees engaged in hazardous work under the Bureau of Mines or the Forestry Service);

The Panama Canal Act of August 24, 1912, 37 Stat. 560 (authorized the President to provide compensation for all employees injured while working in connection with the Panama Canal or the Panama Railroad);

The Federal Employees Compensation Act of September 7, 1916, 39 Stat. 742, 5 USC 751 et seq. (the present Act covering the employees of the United States, defined in Section 40 (5 USC 790), as "all civil employees of the United States and of the Panama Railroad Company").

Act of July 15, 1939, 53 Stat. 1042, 5 USC 797 (extended the present Act to members of the Officers' and Enlisted Reserve Corps of the Army injured in line of duty in peacetime, and provided they should elect whether to receive benefits under the Act or pensions based upon military service.)

*²The Shipping Act of September 7, 1916, 39 Stat. 728, 46 USC 801-804 (this Act passed the same day as the Federal Employees Compensation Act, created the United States Shipping Board and subjected every vessel purchased, chartered, or leased from the Board, while employed as a merchant vessel, to all liabilities governing merchant vessels);

The Federal Control Act of March 21, 1918, 40 Stat. 451 (permitted the United States, through its Director General of Railroads, to be sued for any injury negligently caused on any line of railway in his custody, precisely as a common carrier corporation operating such line might have been sued);

The Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, 46 USC 741-752 (subjected the United States and its wholly owned corporations to suits in personam in respect to all vessels owned by the United States or such corporations and employed as merchant vessels, also authorized suits to proceed in accordance with the principles of libels in rem, but exempted United States' vessels from seizure by judicial process).

The Public Vessels Act of March 3, 1925, 43 Stat.

112, 46 USC 781-790 (permitted libels in personam to be brought against the United States for damages caused by public vessels of the United States).

The Tennessee Valley Authority Act of May 18, 1933, 48 Stat. 58, 16 USC 831-831dd (created the Tennessee Valley Authority, a corporate body, and granted it the power to sue and be sued).

The Federal Tort Claims Act of August 2, 1946, 60 Stat. 812, 28 USC 1346, 2671-2680 (subjected the United States to suits for damages caused by the negligence of its employees while acting in the scope of their employment).

Other statutes which merely granted certain federal corporations the power to sue and be sued are not included in this listing inasmuch as no pertinent cases concerning them have been found.

^{*3}That case held that the Congress had provided the Federal Employees' Compensation Act as the exclusive remedy against the United States of injured employees of the TVA. The court's decision was based entirely on features of the Tennessee Valley Authority Act, *supra* note 2, which have no analogy in the other statutes here under consideration.

In *O'Neal v. United States*, 11 F. 2d 869 (E. D. N. Y. 1925), the court appears to express the opinion that the Federal Employees Compensation Act is the exclusive remedy of federal employees. However, that case cannot be accepted as a holding to that effect inasmuch as the claimant was a coast guardsman, not entitled to compensation under the Act.

^{*4}*Panama R. Co. v. Minnix*, 282 Fed. 47 (5 Cir. 1922); *Panama R. Co. v. Strobel*, 282 Fed. 52 (5 Cir. 1922). The Panama Railroad was (until 1948) a New York corporation wholly owned by the United States since 1905. Although a suit against the railroad was not technically one against the United States, and recovery from the railroad was indirectly a recovery from the United States.

⁵*Payne v. Cohlmeier*, 275 Fed. 803 (7 Cir. 1921); *Dahn v. McAdoo*, 256 Fed. 549 (N.D. Iowa 1919), reversed on the ground that plaintiff had elected the remedy provided by the Federal Employees Compensation Act by applying for and accepting compensation payments, *Hines v. Dahn*, 267 Fed. 105 (8 Cir. 1920), Circuit Court judgment aff'd sub nom *Dahn v. Davis*, 258 U.S. 421 (1922).

⁶*Marine v. United States*, 65 F. Supp. 111 (Md. 1946), aff'd 155 F. 2d 456 (4 Cir. 1946).

⁷*Mandel v. United States*, 74 F. Supp. 754 (E.D. Pa. 1947); *Smith v. United States*, N.D. Calif., No. 25180, August 13, 1949; *Henz v. United States*, N.D. Calif., No. 25315, January 17, 1950; *Sims v. United States*, N.D. Calif., No. 25434, December 28, 1949.

In at least two cases, seamen injured while employed aboard United States' vessels were permitted to sue under the Public Vessels Act without discussion of the effect of the FECA. *United States v. Loyola*, 161 F. 2d 126 (1947); *Krey v. United States*, 123 F. 2d. 1008 (1941).

⁸*White v. United States*, 77 F. Supp. 316 (N.J. 1948). In *Elgin v. United States*, 89 F. Supp. 195 (W.D. Mo. 1950) the court rendered a judgment in favor of a federal employee against the United States under the Tort Claims Act, without discussion of the FECA.

⁹See, e.g. *Axtell v. United States*, 286 Fed. 165 (E.D. N.Y. 1922); *Unica v. United States*, 287 Fed. 177 (S.D. Ala. 1923); *Morris v. United States*, 3 F. 2d 588 (2 Cir. 1924); *United States Shipping Board Emergency Fleet Corporation v. O'Shea*, 5 F. 2d 123 (App. D.C. 1925); *Zinnel v. USSBEFC*, 10 F. 2d 47 (2 Cir. 1925); *Hansen v. United States*, 12 F. 2d 321 (S.D. Ga. 1926); *Maloney v. United States*, 7 F. Supp. 14 (S.D. N.Y. 1927); *USSBEFC v. Greenwald*, 16 F. 2d 948 (2 Cir. 1927); *Stewart*

v. United States, 25 F. 2d 869 (E.D. La. 1928); Howarth v. USSBEFC, 24 F. 2d 374 (2 Cir. 1928); Ives v. United States, 58 F. 2d 201 (2 Cir. 1932); Stratton v. United States, 8 F. Supp. 429 (S.D. N.Y. 1934); Helmke v. United States, 8 F. Supp. 521 (E.D. La. 1934); Carlson v. United States, 71 F. 2d 117 (5 Cir. 1934); Johnson v. United States, 74 F. 2d 703 (2 Cir. 1935); Smith v. United States, 96 F. 2d 976 (5 Cir. 1938); Desrochers v. United States, 105 F. 2d 919 (2 Cir. 1939).

Employees of the Fleet Corporation were employees of the United States entitled to the benefits of the Federal Employees Compensation Act. Seamen aboard Fleet Corporation vessels were considered to be employees of the United States, even though the vessel was operated by a private agent, if the agency contract was the so-called MO 4 form of agreement. See 34 Ops. Atty Gen. 120 (1924) and 363 (1925). The cases cited above do not always make clear by whom or under what type of agreement the vessel involved was operated. But, the claimants in all of the cases appear to have been treated as employees of the United States; certainly this is true of those cases where the claimant established rights against the United States under the Jones Act, 41 Stat. 1007, 46 USC 688.

^{*10}See Dahn v. Davis, 258 U.S. 421, 428 (1922); Brady v. Roosevelt S.S. Co., 317 U.S. 575, 577 (1943); Brooks v. United States, 337 U.S. 49, 53 (1949).

^{*11}O'Neal v. United States, 11 F. 2d 869 (E.D. N.Y. 1925), aff'd 11 F. 2d 871 (2 Cir. 1926); Haselden v. United States, 24 F. 2d 529, (E.D. N.Y. 1927), aff'd sub nom; Dobson v. United States, 27 F. 2d 807 (2 Cir. 1928); Brady v. United States, 151 F. 2d 742, (2 Cir. 1945) cert. denied 326 U.S. 795 (1946).

^{*12}For an explanation of the apparent incon-

sistency between this statement and the discussion of the Federal Employees Compensation Act in *O'Neal v. United States*, see note 3, *supra*.

*¹³See also *Wootton v. United States* (The Culber-son), 61 F. 2d 195 (3 Cir. 1932) where the mother of a coast guardsman was permitted to sue the United States under the Suits in Admiralty Act, without discussion of the effect of any possible compensation under the veterans' pension laws.

*¹⁴House Report 2572, Senate Reports 1655, 1813, 77th Congress, Second Session; House Report 107, Senate Report 62, 78th Congress, First Session.

*¹⁵"The United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels."

*¹⁶*Dahn v. Davis*, 258 U.S. 421 (1922), affirming *Hines v. Dahn*, 267 Fed. 105 (8 Cir. 1920); *Hillenbrand v. United States*, 1929 A.M.C. 885 (S.D. N.Y. 1929); *Militano v. United States*, 55 F. Supp. 904 (S.D. N.Y. 1943); *aff'd* 156 F. 2d 599 (2 Cir. 1946), cert. dismissed, 329 U.S. 682 (1946); *Parr v. United States*, 78 F. Supp. 693 (Kan. 1948), *aff'd* 172 F. 2d 462 (10 Cir. 1949); *Johnson v. United States*, 89 F. Supp. 65 (E.D. Va. 1949); *Frader v. United States*, 91 F. Supp. 657, 1950 A.M.C. 784 (S.D. N.Y. 1950); *Banks v. United States*, No. 25274, N.D. Calif., May 18, 1950.

See also the dicta in *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 581 (1943), and *Brooks v. United States*, 337 U.S. 49, 53 (1949). Compare *White v. United States*, 77 F. Supp. 316 (N.J. 1948).

[Endorsed]: Filed November 30, 1950.

[Title of District Court and Cause.]

SUPPLEMENTARY OPINION

Goodman, District Judge.

When the court filed its opinion in this and consolidated cases on November 30, 1950, instead of dismissing this case, as it did the others, on the ground that the acceptance of compensation under the Federal Employees Compensation Act, 5 USC 751 et seq., precluded a suit for damages, the court reserved decision pending further hearing. It did so because libelant Gibbs, unlike the other libelants in the consolidated cases, received no monetary compensation under the FECA, but only medical and hospital attention.

At the subsequent hearing the court received evidence as to the circumstances under which the hospital and medical benefits of the FECA were had by Gibbs as well as evidence upon the general issue of liability of the United States.

The testimony disclosed that Gibbs was a supervisory employee; that not only was he aware and cognizant of the hospital and medical benefits available to civilian employees of the United States under the statute, but that he had also advised other employees under his supervision of these benefits. He received hospitalization and medical attention for his injuries at the United States Marine Hospital. After his discharge from the hospital he received out-patient attention for some time.

Libelant's main contention is that the receipt

and acceptance of hospital and medical attention did not constitute an election of remedies on his part. Only the receipt of monetary compensation, it is asserted, would debar the present suit. This contention I find to be unmeritorious.

The statute itself, 5 USC 790 states that "the term compensation includes the money allowance payable to an employee, or his dependents and any other benefits paid for out of the compensation fund." (Emphasis supplied.)

Federal cases are uniformly to the effect that hospital and medical services constitute compensation within the meaning of 5 USC 790. See *U.S. v. Bettis*, 39 F.Supp. 160 (S.D. Calif. 1941) and cases therein cited; *U.S. v. Steffner* (N.D. Calif., #16747 1923) cited in *U.S. v. Bettis*, *supra* at page 163; *U.S. v. Crystal*, 39 F.Supp. 220 (N.D. Ohio 1941.)

Thus it is clear that the acceptance of any of the specified statutory benefits would amount to acceptance of compensation and thus constitute an election of remedies.

It has been contended by libelant that the doctrine of election of remedies is not applicable here because libelant is entitled to split the benefits of the statute, i.e. that he may accept certain of the benefits and reject other benefits and still have, as to the benefits rejected, the right to maintain an action such as this against the United States. Neither reason nor authority support such a novel concept. Certainly such extraordinarily favorable

treatment should not be extended in the absence of clear Congressional intent. There is not the slightest evidence that Congress intended to extend such an unusual favor to civilian employees. Libelant has cited certain cases wherein employee actions in damages were permitted against the United States even though hospitalization and maintenance had been received. But these cases are not apropos because they were seamen's cases, And seamen, besides the right to sue for damages, have, under general maritime law, the right to recover maintenance, cure and wages. Such is not true in the case of shoreside civilian employees. The latter have only the rights specifically provided for by the FECA and the Public Vessels Act, 46 USC 781 et seq.

My conclusion therefore is that libelant Gibbs, having knowingly accepted the benefits of the Compensation Act, is debarred from pursuing the instant case under the Public Vessels Act. The case of Gibbs will therefore be dismissed. Counsel should present findings accordingly.

Dated: February 13, 1951.

[Endorsed]: Filed February 16, 1951.

[Title of District Court and Cause.]

LIBELANT'S PROPOSED AMENDMENTS TO
FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Comes Now libelant in the above-captioned case and respectfully proposed the following amendments to the proposed findings of fact of the respondent herein heretofore lodged on March 22, 1951, and received by libelant on March 23, 1951:

I.

With reference to paragraph III of respondent's Proposed Findings of Fact that the same shall be amended to read as follows:

"III. That on said November 19, 1946, while libelant was engaged as aforesaid, an explosion occurred aboard said U.S.S. Antietam by reason of the negligence or carelessness of the respondent, United States of America, whereby libelant sustained personal injuries."

II.

That paragraph IV of said respondent's Proposed Findings of Fact shall be amended to read as follows:

"IV. That although respondent failed to produce proof of any substantial sums expended in behalf of the hospital and medical benefits tendered to said libelant, said libelant James C. Gibbs was fully aware and cognizant of the hospital and medical benefits available to him

as a civil service employee of the United States under the Federal Employees' Compensation Act, and that he, with such knowledge, applied for, received and accepted hospitalization and medical attention as a benefit under said Act, for his injuries, at the United States Marine Hospital, San Francisco, California, both before and after institution of this action. After his discharge from the hospital, he was directed to and did receive out-patient attention on a few occasions prior to the institution of this action."

Conclusions of Law

Libelant moves this Honorable Court to amend respondent's Proposed Conclusions of Law as follows:

I.

With reference to paragraph II of said respondent's Proposed Conclusions of Law that the same be amended to read as follows:

"II. That the hospital benefits and medical services are provided under the Federal Employees' Compensation Act."

II.

With reference to paragraph IV of said respondent's Proposed Conclusions of Law that the same be amended to read as follows:

"IV. That libelant, by acceptance of hospital benefits and medical services provided

under said Federal Employees' Compensation Act made an election which bars and estops him from recovery in this action under the Public Vessels Act."

Respectfully submitted,

BELLI, ASHE & PINNEY,

By LOU ASHE,

Proctors for Libelant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 27, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above cause was consolidated with six other cases (Nos. 25263, 25264, 25265, 25287, 25303 and 25344), and came on regularly for trial before the Court on June 19, 1950, the parties appearing by their respective proctors. All parties having consented that said causes could be tried preliminarily upon the issues presented by the Third, Separate and Distinct Defense set forth in the answer of the respondent filed in each said cause, such preliminary trial was had on said day and on each succeeding day thereafter to and including June 22, 1950. Oral and documentary evidence having been introduced by and on behalf of the parties and the matter having been argued and submitted, and the Court being fully

advised, the Court handed down its decision wherein the six other causes above mentioned were dismissed, but a decision in the above-captioned cause was reserved pending further hearing. The Court reserved its decision in this case on the ground that the libelant, James C. Gibbs, unlike the other libelants in the consolidated cases, received no monetary compensation under the Federal Employees' Compensation Act, but only medical and hospital attention.

At the subsequent hearing the Court received evidence as to the circumstances under which the hospital and medical benefits of the Federal Employees' Compensation Act were had by libelant James C. Gibbs, as well as evidence upon the general issue of liability of the United States, and now, being fully advised in the premises, makes the following

Findings of Fact

That on November 19, 1946, and at all times herein material, libelant James C. Gibbs was a civilian employee of respondent United States of America, assigned to and employed in an executive branch of respondent, to wit, the Department of the Navy, as a first class shipfitter, at the San Francisco Naval Shipyards, Hunters Point, San Francisco, California, as a shoreside employee and not a seaman, master, or member of the crew of any vessel, pursuant to Acts of Congress and regulations of the United States Civil Service Commission pertaining to the employment of civilian personnel by the Department of Navy.

II.

That on November 19, 1946, in accordance with orders and assignment as employee of respondent, libelant was engaged as a first class shipfitter in the performance of work and repairs assigned to him as the duty of said employee, upon the Aircraft Carrier of respondent, U.S.S. Antietam, then and there docked at the San Francisco Naval Shipyard, Hunters Point, San Francisco, California.

III.

That on said November 19, 1946, while libelant was engaged as aforesaid, an explosion occurred aboard said U.S.S. Antietam whereby libelant sustained personal injuries.

IV.

That libelant James C. Gibbs was fully aware and cognizant of the hospital and medical benefits available to him as a civil service employee of the United States under the Federal Employees' Compensation Act, and that he, with such knowledge, applied for, received and accepted hospitalization and medical attention as a benefit under said Act, for his injuries, at the United States Marine Hospital, San Francisco, California, both before and after institution of this action. After his discharge from the hospital he received out-patient attention for some time prior to the institution of this action.

Conclusions of Law

I.

That this Court has jurisdiction of the parties and the subject-matter of this suit under the Public Vessels Act, 46 U.S.C. 781, et seq.

II.

That hospital benefits and medical services are provided under the Federal Employees' Compensation Act and are part of the employee's compensation.

III.

That libelant, in accepting hospital benefits and medical services provided under the Federal Employees' Compensation Act, made his election to accept compensation under said Act.

IV.

That libelant, by acceptance of compensation under the Federal Employees' Compensation Act, made an election which bars and estops him from recovery in this action under the Public Vessels Act.

V.

That respondent is entitled to a decree dismissing the libel with costs in respondent's favor.

Let Decree and Judgment be entered accordingly.

Dated: March 28th, 1951.

/s/ LEWIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed March 29, 1951.

In the United States District Court for the
Northern District of California, Southern Division

Adm. No. 25255

JAMES C. GIBBS,

Libellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

DECREE

The above cause having come on for trial before this Court on June 19, 1950, and on each succeeding day thereafter to and including June 22, 1950, and on January 12 and January 26, 1951, on the issues presented by the pleadings, and the said cause having been tried thereon and submitted to the Court, and the Court having made and filed herein its Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that the libel filed in the above cause be dismissed, and that Respondent recover its costs in the amount of \$.....

Judgment Rendered This 28 Day of March, 1951.

/s/ LEWIS E. GOODMAN,

United States District Judge.

Lodged March 22, 1951.

[Endorsed]: Filed March 29, 1951.

Entered March 30, 1951.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF DECREE

To Libelant above named, and to Messrs. Belli,
Ashe and Pinney, his proctors:

You Are Hereby Notified that on March 30, 1951,
Decree was entered in the above-entitled suit in
favor of Respondent, United States of America,
and against the libelant above named, as follows:

It Is Ordered, Adjudged and Decreed that the
libel filed in the above cause be dismissed, and
that Respondent recover its costs in the amount
of \$.

Dated: April 4, 1951.

/s/ FRANK J. HENNESSY,
United States Attorney;

/s/ ANTOINETTE E. MORGAN,
Assistant United States
Attorney.

/s/ HOWARD J. BERGMAN,
Special Assistant to the
United States Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 4, 1951.

[Title of District Court and Cause.]

PETITION FOR APPEAL

Pursuant Rule 33, Rules in Admiralty, United
States Court of Appeals for the Ninth Circuit

To the Honorable Louis E. Goodman,
District Judge:

Comes now libelant James C. Gibbs, in the above-
entitled action and respectfully shows the court that:

I.

Petitioner is the libelant in the above-entitled
action.

II.

That heretofore on February 16, 1951, this honor-
able court filed its Supplementary Opinion; that
said Opinion was supplementary to that theretofore
filed on November 30, 1950, in this and consolidated
cases.

III.

That on March 30, 1951, judgment and decree
were entered in favor of the respondent United
States and against libelant James C. Gibbs, and
libelant's libel was ordered dismissed; that until
the aforesaid date no final decree of dismissal was
entered; that this petition is made timely and within
the statutory time allowed under 28 USCA, Section
2107, in Admiralty Cases.

IV.

That libelant desires to appeal from the judg-
ment and decree of this honorable court to the

United States Court of Appeals for the Ninth Circuit and is prepared to post bond in the sum of \$250.00 or such other reasonable bond as the Court may direct; that said appeal is not frivolously taken.

V.

That libelant will set forth Assignment of Errors pursuant to Rule 35, Rules in Admiralty, United States Court of Appeals for the Ninth Circuit.

Wherefore, Petitioner prays order of this Court allowing appeal to the United States Court of Appeals for the Ninth Circuit upon such terms as the Court may direct.

/s/ JAMES C. GIBBS,
Libelant.

BELLI, ASHE & PINNEY.
By /s/ LOU ASHE,
Proctors for Libelant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1951.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The verified Petition for Appeal in the above-entitled matter having come before this court on the 14th day of June, 1951, and it appearing to the court that said petition has been made within the statutory time permitted for appeals in Admiralty

under Title 28 USCA, Section 2107, and it further appearing that libelant has filed herein an Assignment of Errors pursuant to Rule 35, Rules in Admiralty, United States Court of Appeals for the Ninth Circuit, and the court being satisfied that said appeal is not frivolous,

It Is Ordered, Adjudged and Decreed that libelant James C. Gibbs be and he is hereby authorized to prosecute his appeal to the United States Court of Appeals for the Ninth Circuit upon posting with the Clerk of the District Court of the United States security bond in the sum of \$250.00.

/s/ LOUIS E. GOODMAN,
U. S. District Court Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Pursuant Title 28 USCA, Section 2107

To the Clerk of the Above-Entitled Court:

To the United States Attorney for his jurisdiction and to Antoinette E. Morgan, Assistant U. S. Attorney, and Howard J. Bergman, Special Assistant to the United States Attorney:

You and Each of You Will Please Take Notice, that the libelant in the above-entitled action, James

C. Gibbs, does hereby appeal to the Honorable Judges of the United States Court of Appeals for the Ninth Circuit from the Decree and Judgment of the Honorable Louis E. Goodman, filed herein and entered upon the 30th day of March, 1951, and from all of it.

BELLI, ASHE & PINNEY,

By /s/ LOU ASHE,

Proctors for Libelant,
James C. Gibbs.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1951.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Pursuant Rule 35, Rules in Admiralty, United States Court of Appeals for the Ninth Circuit

Comes now libelant, in the above-entitled action, and respectfully urges and asserts the following errors in the findings of fact, conclusions of law, decree and judgment of the Honorable Louis E. Goodman, District Judge.

I.

The Honorable District Court erred in refusing to incorporate libelant's proposed amendments to the findings of fact so as to include a finding that the libelant was injured in the course of his em-

ployment on November 19, 1946, aboard the USS Antietam by reason of the negligence of the respondent, United States of America. The respondent having stipulated that the doctrine of *res ipsa loquitur* was applicable and the Court having so ruled, the failure of the respondent to introduce any evidence in explanation of the explosion which admittedly caused libelant's injury, there could be but one conclusion, to wit, that the injuries sustained by the libelant were proximately caused by the negligence of the respondent.

II.

The Honorable District Court erred in declaring that the mere acceptance of hospital and medical benefits by a shoreside civilian employee of the United States (prior to the 1949 Amendment to the FECA which made the remedy exclusive) was in and of itself an acceptance of "compensation" under the Federal Employees' Compensation Act of 1916.

III.

The Honorable District Court having erred in declaring the acceptance of hospital and medical benefits to be an "acceptance of compensation," erred further in then declaring that the acceptance of such "compensation" (hospital and medical benefits) was, *per se*, an Election of Remedies—and precluded libelant from pursuing a libel in admiralty under the Public Vessels Liability Act, 46 USCA, 781 *et seq.*

IV.

The Honorable District Court erred in concluding that hospital benefits and medical services are provided under the Federal Employees' Compensation Act and are part of the employee's compensation.

V.

The Honorable District Court erred in dismissing libelant's libel herein.

Respectfully submitted,

BELLI, ASHE & PINNEY,

By /s/ LOU ASHE,

Proctors for Libelant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1951.

CITATION

United States of America—ss.

The President of the United States of America
To The United States of America, Respondent, and
to Chauncey Tramutolo, United States Attorney;
Antoinette E. Morgan, Esq., Assistant
United States Attorney, and Howard J. Bergman,
Special Assistant to the United States
Attorney, its Attorneys:

Greeting:

You Are Hereby Cited and Admonished to be
and appear at a United States Court of Ap-

peals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within forty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein James C. Gibbs is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis E. Goodman, United States District Judge for the Northern District of California, Southern Division, this 15th day of June, A.D. 1951.

/s/ LOUIS GOODMAN,

United States District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 15, 1951.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, James C. Gibbs, as principal, and Fidelity and Deposit Company of Maryland, as sureties, are held and firmly bound unto United States of

America in the full and just sum of Two Hundred Fifty and no/100 (\$250.00) dollars, to be paid to the said United States of America, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of June in the year of our Lord One Thousand Nine Hundred and Fifty-one.

Whereas, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit depending in said Court, between James C. Gibbs and United States of America, a judgment was rendered against the said Principal and the said Principal having filed in said Court a notice of appeal to reverse the Decree in the aforesaid suit, on appeal to United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said James C. Gibbs shall prosecute said action to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if he fail to make his plea

good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

[Seal] By /s/ W. G. RISDON,
Attorney-in-Fact.

Attest:

/s/ S. CLIMO,
Agent.

The premium charged for this bond is \$10.00 per annum.

State of California,
City and County of San Francisco—ss.

On this 15th day of June, A.D. 1951, before me, Belle Jordan, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared W. G. Risdon, Attorney-in-Fact, and S. Climo, Agent, of the Fidelity and Deposit Company of Maryland, a corporation known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent, respectively, of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of

Maryland thereto as principal and their own names as Attorney-in-Fact and Agent, respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Seal] /s/ BELLE JORDAN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Nov. 9, 1952.

[Endorsed]: Filed June 16, 1951.

[Title of District Court and Cause.]

SUPPLEMENT TO PETITION FOR APPEAL

Pursuant to Rule 36, Rules in Admiralty, United States Court of Appeals for the Ninth Circuit

Comes Now James C. Gibbs, appellant in the above-entitled matter, and respectfully requests that the appeal in this case heretofore taken on June 14, 1951, be limited to a consideration by the Honorable Court of Appeals of certain specific issues involved in the cause as follows:

I.

When, following his injury upon a public vessel of the United States in navigable waters of the United States, whereon he was in the course of his employment on November 19, 1946, a shoreside

civilian employee of the United States, neither formally or informally applies for nor accepts money compensation, but does consciously accept hospital and medical benefits for a limited period, does the acceptance of such hospital and medical benefits constitute an election to accept compensation under the Federal Employees Compensation Act, prior to the amendments of October, 1949?

II.

Based upon the premises heretofore set forth in paragraph I hereof, does the acceptance of hospital and medical benefits constitute an election to pursue exclusively the rights available to said employee under the Federal Employees Compensation Act (prior to amendments of October, 1949), so as to preclude said employee from prosecuting a libel in admiralty against his employer, the United States, under the Public Vessels Liability Act, 46 U.S.C. 781, et seq.?

III.

Are hospital benefits and medical services provided under the Federal Employees Compensation Act a part of the compensation of a civilian employee of the United States?

IV.

Where it is admitted that an instrumentality wholly and exclusively in control of the respondent has exploded, causing an injury to the libelant, and where it is also stipulated by the respondent that the doctrine of *res ipsa loquitur* is applicable to the facts in evidence, and where the respondent

presents no evidence in explanation of the explosion aboard its vessel nor in rebuttal of the presumption of negligence, was there errancy in the refusal of the trial court to find that libelant's injuries were the proximate result of respondent's negligence?

Respectfully submitted,

BELLI, ASHE & PINNEY,

By /s/ LOU ASHE,

Proctors for Libelant,

James C. Gibbs.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 28, 1951.

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION OF TIME
IN WHICH TO DOCKET APOSTLES ON
APPEAL

It Is Hereby Stipulated by and between counsel
for the libelant and respondent in the above-
entitled action that the time for docketing the
Apostles on Appeal in the within matter may be
extended to and including August 20, 1951.

BELLI, ASHE & PINNEY,

By /s/ LOU ASHE,

Proctors for Libelant,

James C. Gibbs.

/s/ CHAUNCEY F. TRAMUTOLO,

United States Attorney.

/s/ KEITH R. FERGUSON,

Special Assistant to the

Attorney General.

/s/ HOWARD J. BERGMAN,

Special Assistant to the Attorney General; Proctors

for Respondent, United States of America.

[Endorsed]: Filed July 18, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO DOCKET THE APOSTLES ON APPEAL

Good Cause Appearing Therefor, and upon the filing of the stipulation of the parties hereto of their consent to the extension of time within which to docket the Apostles on Appeal herein, and upon representation to this Court that the Notice of Appeal, Petition for Appeal and Order for Appeal were herein filed on June 14, 1951, and it further appearing that the extension of time requested by the parties will not exceed ninety days from the date of filing of the preliminary documents on appeal, as aforesaid,

It Is Hereby Ordered, Adjudged and Decreed that the time for docketing the Apostles on Appeal in the Court of Appeals of the Ninth Circuit is extended up to and including August 20, 1951, effective for the benefit of all parties concerned.

Dated July 18th, 1951.

/s/ LOUIS E. GOODMAN,

Judge of the District Court.

[Endorsed]: Filed July 18, 1951.

[Title of District Court and Cause.]

SUPPLEMENT TO DESIGNATION
OF APOSTLES ON APPEAL

To the Clerk, United States District Court, for the
Above Jurisdiction:

Comes Now James C. Gibbs, libelant in the
above-entitled matter, and requests that the "Designation of Apostles on Appeal" heretofore filed on July 25, 1951, shall be supplemented by the following:

1. Transcript of Testimony.

With particular reference to the proceedings in the above matter held on January 5, 1951, so much of the record as reflects the colloquy of counsel for libelant, respondent and the court relative to the applicability of the doctrine of *res ipsa loquitur* to the facts of the case; the admission by counsel for the respondent that the aforesaid doctrine is applicable to the facts; the statement by the court that libelant had made out a *prima facie* case and the court would so hold.

Respectfully submitted,

BELLI, ASHE & PINNEY,

By /s/ LOU ASHE,

Proctors for Libelant.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 31, 1951.

In the Southern Division of the United States
District Court for the Northern District of
California

Nos. 25255, 25263, 25264, 25265, 25287, 25303, 25344
(Consolidated)

Before: Hon. Louis E. Goodman,
Judge.

JAMES C. GIBBS, Libelant, et al.,
Libelants,

vs.

UNITED STATES OF AMERICA,
Respondent.

EXCERPTS FROM TESTIMONY

Appearances:

For the Libelant James C. Gibbs,
Case #25255:

MELVIN M. BELLI, ESQ., by
LOU ASHE, ESQ.

For the Libelant Henry Williams,
Case #25263:

ALBERT H. GOMMO, JR., ESQ., and
G. C. RINGOLE, ESQ.

For the Libelant Michael A. Dimatteo,
Case #25264:

ALBERT H. GOMMO, JR., ESQ., and
G. C. RINGOLE, ESQ.

For the Libelant David Bower,

Case #25265:

ALBERT H. GOMMO, JR., ESQ., and
G. C. RINGOLE, ESQ.

For the Libelant Forest J. Kincade,

Case #25287:

ALBERT H. GOMMO, JR., ESQ.,
FRANK S. BARRETT, ESQ., and
ERIC A. FALCONER, ESQ.

For the Libelant William Comber,

Case #25303:

CHARLES A. CHRISTIN, ESQ., and
WM. T. ECKHOFF, ESQ.

For the Libelant Robert Lee Dentley,

Case #25344:

MESSRS. GLADSTEIN, ANDERSON,
RESNER & SAWYER, by
HERBERT RESNER, ESQ.

For the Government:

FRANK J. HENNESSY,
U. S. Attorney, by
C. ELMER COLLETT,
Asst. U. S. Attorney.

Monday, June 19, 1950, at 10 A.M.

Mr. Collett: Will you take the stand, please?

HILDA LIER

called as a witness on behalf of the Respondent;
sworn.

The Clerk: Will you state your name to the Court, please?

A. Hilda Lier.

Mr. Resner: What is the witness' first name?

The Witness: Hilda.

Direct Examination

By Mr. Collett:

Q. By whom are you employed, Mrs. Lier?

A. The San Francisco Naval Shipyard.

Q. Are you married or single?

A. I am single.

Q. It is Miss Lier, then?

A. Well, I use the word "Mrs."

Q. Yes. And you say you are employed by the United States Naval Shipyard at Hunters Point?

A. Yes, sir.

Q. In what capacity are you presently employed?

A. Compensation and statistical clerk.

Q. And how long have you been employed as compensation and statistical clerk?

A. Since April 1 of 1946.

Q. And were you employed in that capacity in

(Testimony of Hilda Lier.)

the period from [2*] 19 November, 1946, thereafter? A. Yes, sir.

Q. Yes. Now, what is the procedure in accordance with the regulations for filing a claim for compensation?

Mr. Gommo: I object to that, your Honor. I can state the general objection would be outlined by the Act itself. Now, to say that the procedure she uses conforms with the Act is attempting to state a conclusion.

The Court: Well, maybe that is to you. However, why do you object to it? If she followed some procedure that is not in conformity with the law, that would be to your advantage, wouldn't it?

Mr. Gommo: I believe the question assumes a conclusion, your Honor.

The Court: What Mr. Collett is trying to find out, a very simple thing, I think, a man gets injured and since he works for the United States, what do they do about it?

Mr. Gommo: Yes.

The Court: That can't be anything objectionable.

Mr. Gommo: But he said in conformity with the Act, your Honor.

The Court: I didn't hear him say that.

Mr. Gommo: In conformity with the regulations, that is what I am objecting to.

Mr. Collett: Withdraw the question. [3]

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Hilda Lier.)

Q. Mrs. Lier, do you recall the occurrence of an accident on or about November 19, 1946, in which several persons, employees of the United States, were injured on the U.S.S. Antietam?

A. Yes, sir, I do.

Q. Did you yourself do anything with regard to the matter of preparing any documents or papers as pertaining to any possible claims they might have for compensation?

A. I prepare all the CA-1's, that is the employee's notice of injury, that is the first document.

Q. I will show you——

Mr. Christin: I would like to have it stricken with reference to compensation, a conclusion. Leave the conversation in, but with reference to any particular thing, that is a conclusion of the witness, going to object to the question. He said the conversation pertaining——

The Court: I don't think—you misunderstood; he didn't ask for any conversation.

Mr. Christin: Pertaining to compensation.

The Court: Pertaining to compensation.

Mr. Christin: That imparts a conclusion, but pertaining to compensation is a conclusion.

The Court: There isn't any jury here and everybody in this courtroom knows we are talking about compensation and we know what the legal issue is in the case. I think it would be wasteful of time to hew the line with respect to [4] conclusions of that nature, Mr. Christin.

Mr. Christin: I am not captious, just want to

(Testimony of Hilda Lier.)

make the statement so that we understand the word compensation, but it may be on this Court to determine what the parties involved mean by compensation, a rather loose word.

The Court: Of course that question, you can meet it when you get to it. I will overrule the objection.

Mr. Collett: I think the question had been answered.

The Court: Yes. I will allow the answer to stand.

Q. (By Mr. Collett): Mrs. Lier, I show you respondent's Exhibit A-1 for identification and document No. 14 is a CA-1 pertaining to one James B. Gibbs. Can you identify that document?

A. Yes, sir.

Q. Is that your signature?

A. That is my signature and I prepared the documents for these people. It was not possible for those people to prepare them themselves, and the work has to be done with dispatch and papers on the way.

Q. Now, what is the CA-1 form?

Mr. Resner: Let the witness answer the question. She hadn't finished yet.

The Court: Did you finish your answer?

The Witness: Well,——

The Court: I think the question was whether you could [5] identify the document.

Mr. Collett: Yes.

The Witness: Yes, I could; I can.

(Testimony of Hilda Lier.)

The Court: Did you prepare it yourself?

The Witness: I prepared this document.

The Court: All right.

Q. (By Mr. Collett): Did you sign that document?

A. Yes, I did sign it by H. Lier for James B. Gibbs. It was intended to be James C., if that is his name.

Q. What is that document CA-1?

A. This is employee's notice of injury or occupational disease. It is the initial paper that serves notice of injury.

Q. Is that necessary that the individual who is injured sign that paper?

Mr. Resner: Now, if your Honor please, that calls for a legal conclusion.

The Court: Yes.

Q. (By Mr. Collett): Is it your——

A. Well,——

Q. Is it your customary practice in regard to the CA-1 form that it is signed by the individual who is injured or may have a——

Mr. Resner: Your Honor, this is all immaterial, nothing to do with the case. The only thing we are concerned with is what happened; she says she signed the form for the injured [6] worker.

The Court: Are you trying to determine what the circumstances were at the time that she signed it, is that it?

Mr. Collett: Well, that particular form, it doesn't make any difference whether signed by the

(Testimony of Hilda Lier.)

individual or not; it is a notice that is required by the statute and by the regulations.

The Court: Why don't you ask—why did you come to make out this form—I would like to know myself—how did you come to make it out?

The Witness: We have authority in the Compensation Act to make it out in lieu of the injured worker when he is not able to do so.

The Court: When this form was made out where was Gibbs; do you know where he was at the time?

The Witness: He likely was in the hospital. This would have been made out within a very short time after the injury occurred, just as soon as the paper work was possible to be done.

The Court: Your office knew that some of these men had been injured in the explosion of the Antietam, is that right?

The Witness: Actually we were all there that day.

The Court: And then you proceeded to get out these necessary—this form?

The Witness: That was the first order in my processing of [7] papers.

The Court: Did you do that in the case of all the men involved in this explosion so far as you know?

The Witness: I believe I made up everything covering all the men at one time. I went through all of the injured people with this paper and then I processed all the papers that were necessary.

(Testimony of Hilda Lier.)

Q. (By Mr. Collett): You say all the papers; you are referring to the CA-1?

A. The CA-1 forms. There were eight badly injured men and there was one death. I processed all eight CA-1's to begin with; that was the initial step. After the first step was recording of the medical record; then this was the second step.

Q. What is CA-2?

A. Official superior's report of injury.

Mr. Resner: I couldn't hear the witness.

The Witness: Official superior's report of injury.

Q. (By Mr. Collett): Is there a CA-2 form, respondent's Exhibit 1-A?

A. Yes, sir; here it is.

Q. And was that form likewise prepared by you? A. Yes, sir.

Q. And you say the official superior's report of injury; do you know what that form is, what purpose it serves? [8]

A. Yes, Mr. Ahern, the safety superintendent, acts in the capacity of an official superior for the shipyard employees, and that is his report to the Bureau of Employees Compensation covering certain data that they require on these cases.

Q. And the CA-3 form, was that prepared by you? A. Yes, sir.

Q. And what form is that?

A. That is giving notice of termination of disability or termination of disability or death. The death notice is done there, too.

(Testimony of Hilda Lier.)

Q. Now, Mrs. Lier, in regard to various cases, the subject of this litigation, that is, Henry Williams, Michael A. Dimatteo, David Bower, Forest J. Kincade, James C. Gibbs, Robert Lee Dentley, and William Comber, was in each instance the CA-1 form prepared by you and signed by you on behalf of each one of these individuals?

A. I believe that I signed them all. I'm—I can very—pretty certain that I made them all up the one day there; I did that one job at one time and I'm pretty certain I signed them all. I would have to check with the jackets to be sure, but it seems I planned my work out in that fashion.

Mr. Collett: That is all I am going to ask this witness at this time.

The Court: Well, I think I better—let me look at this exhibit. You're offering the testimony of this witness [9] now mainly in connection with the offer of respondent's Exhibit A-1 to explain the documents; is that right?

Mr. Collett: Yes, if the Court please. At the same time, if it is possible, to save time I have used the testimony in regard to the forms CA-1 and CA-2 as to all of the various claims. In the Gibbs' case, if the Court please, there was no CA-4 form filed, which is the form claim for compensation.

The Court: They may be marked.

The Clerk: Respondent's Exhibit A-1 introduced and filed in evidence.

(Testimony of Hilda Lier.)

(Whereupon the documents above referred to, marked respondent's Exhibit A-1, were received in evidence.)

The Court: You wish——

Mr. Ashe: I would like to ask the witness a few questions.

Mr. Resner: It does seem they ought to be examined before the documents are admitted, your Honor.

The Court: Perhaps you are right about that; I didn't think there was any particular——

Mr. Resner: This is in the nature of voir dire here, if your Honor please, isn't it? We are trying to determine compliance with the law and what was done, even though Mr. Collett has gone on here to try to establish——

The Court: You are going to put this lady back on the stand? [10]

Mr. Collett: If the Court please, we have a complex problem here. Several different individuals, and a number of documents pertaining to each one. Now, if each one has to be, have to proceed with each one separately, then it will be necessary to call, I expect, Mrs. Lier and Mr. Ahern with regard to each separate group of documents. Now, if that is the way we are going to do it, we will proceed accordingly.

Mr. Resner: I don't think your Honor can tell what she will have to tell in any individual case unless examined on that subject, and while the

(Testimony of Hilda Lier.)

cases are consolidated and certain facts and circumstances are consolidated, each case, I am sure, will have different circumstances.

The Court: Your idea is that counsel for Mr. Gibbs should cross-examine——

Mr. Resner: Except as to that part which may be relevant as to all the libelants.

The Court: Very well.

Mr. Ashe: May I proceed?

Cross-Examination

By Mr. Ashe:

Q. It is Miss Lier?

A. I have been married and acquired the title "Mrs."

Q. Mrs. Lier, with reference to the document before us, Exhibit A, and in reference to page 14 of that exhibit, in writing the name James B. Gibbs at the bottom of the document, entitled "Employee's Notice of Injury or Occupational Disease," [11] can you tell us first who wrote James B. Gibbs at that point? A. That looks like my writing.

Q. Now, on the top of that signed by H. Lier, would you state that that was your writing, Mrs. Lier? A. Yes.

Q. Then when the statement is made witnessed Harold E. Gilbert, can you tell us what was meant by the expression?

A. Mr. Gilbert, a former safety inspector, who works——

(Testimony of Hilda Lier.)

The Court: Would you mind speaking louder? I can't hear you.

A. Mr. Gilbert, one of our former safety inspectors, used to help us and he witnessed my writing on that paper.

Q. (By Mr. Ashe): And there is no question that Mr. Gibbs did not sign this document, is there?

A. No question that he did not sign that document.

Q. Did you sign your name, Mrs. Lier, in the presence of Mr. Gilbert? A. Yes, sir.

Q. Mr. Gilbert is still in the employ of the United States Government?

A. In the shipyard, yes. He is no longer safety inspector.

Q. I assume in filling out some of these other documents which you say you had filled out that you obtained information relative to the situation from whatever departments was necessary to approach for that information; is that right? [12]

A. That's right.

Q. Because none of this was yours, of your own personal knowledge without doing so, is that correct? A. I beg your pardon?

Q. None of the information on here was your personal knowledge until you had inquired relative thereto? A. That's right.

Q. Now, I make reference to the official superior's report of injury and with particular reference to the question on line 32: "Was written notice

(Testimony of Hilda Lier.)

of injury given within 48 hours?" You answered "Yes," did you not? A. Yes.

Q. By that you meant this notice to which we have referred to previously, No. 14, CA-1?

A. Yes, sir.

Q. That is exactly what was meant?

A. Yes.

Q. Had you carefully read the language on the bottom of this one, employee's notice of injury or occupational disease? Would you examine it now, please?

A. (Witness reading paper): Yes, this is the form; that is the way these forms are written up by the Bureau.

Q. No authority given to you, was there, Mrs. Lier, by anyone else on behalf of Mr. Gibbs, acknowledging that he "I hereby make claim for compensation." That was the language [13] there; read it from the printed form.

A. Compensation—I believe that I can——

The Court: What is the question?

Mr. Ashe: The question was, did you receive authority from Mr. Gibbs or anyone on his behalf to assert that he was "hereby making claim for compensation?"

A. We are authorized in the Compensation Act to initiate this form for employees where they are unable to do so themselves.

Q. And over and above that, Mrs. Lier, to my most simple question, no one had authority to commit Mr. Gibbs to that statement on this form?

(Testimony of Hilda Lier.)

A. Well, he was sent down to the Marine Hospital, and I believe sending him there obligated the United States Government medical charges that the Compensation Bureau would have to pay. Therefore, this would have to be submitted in any event.

Q. I see. But so far as this—you see what I am trying to get at; I don't mean to trick you.

A. The man was in no condition—I didn't see the man—no condition to talk to. However, to go to the Marine Hospital, but the fact he was sent to the Marine Hospital the charges were obligated, made it mandatory that we fill out that form.

Q. All right. Now, I invite your attention to this next document, this official superior's report of injury, to line 27, [14] in which it says: "Describe in full how the injury occurred." You wrote in: "Injury during explosion, cause as yet undetermined, aboard USS Antietam"; is that correct?

A. Yes, sir.

Q. Is that because you had not yet had the report of the Board of Inquiry?

Mr. Collett: I object to that, if the Court please; immaterial, irrelevant as to whether the Board of Inquiry——

The Court: Sustain the objection.

Mr. Ashe: All right, I will reframe my question.

Q. Question 33, which states names, and addresses of witnesses to the accident: All statements are secured by a formal Board of Inquiry which is still in session. That was a fact, was it not, on the date you made out this report?

(Testimony of Hilda Lier.)

A. I believe it was. I don't know for sure about that.

Q. With reference to Question 34 of this same document entitled Official Superior's Report of Injury, there is the following question: "Was injury caused by a third party other than a Government employee or agency?" You have put in here the answer "No"; is that correct.

Mr. Collett: If the Court please, the document speaks for itself.

The Court: Yes, the document speaks for itself.

Mr. Ashe: My next question is then, if it does, is from what party did you get the information to write in here the [15] word "No"?

Mr. Collett: I object, if the Court please.

The Court: I don't see the competency of it, Mr. Ashe. What does that have to do with it?

Mr. Ashe: Well, it has this much to do with it, your Honor: We hope to proceed if we have overcome the preliminary objection. I know some place there must be a report that bears the cause of the explosion.

The Court: But the records, the question of the accident itself and the causes of it, all that has nothing to do with these compensation records here.

Mr. Ashe: My questions are not directed——

The Court: They haven't any connection with that matter, have they?

Mr. Ashe: Judge, maybe I have misstated my position. I claimed that we didn't accept compensation.

(Testimony of Hilda Lier.)

The Court: I understand you gentlemen have made that very clear to me; I know they didn't, but all we got before us now is these record matters.

Mr. Ashe: If your Honor feels I shouldn't pursue that, I will withdraw the question.

The Court: I understand that perfectly. You are claiming first of all you didn't accept the compensation; secondly, you are not bound by it, and in the third place that the Government is liable to you, and under the Admiralty Law which Mr. [16] Resner eloquently argued is for damages because of the negligent act on the part of the United States or unseaworthiness of this vessel. I understand that very thoroughly. I don't see how every time there is some little item in these records how that is going to help by arguing it out each time.

Mr. Ashe: In all respect to the Court, I will drop that subject for the time being.

The Court: At least you can drop it on the theory that I understand what you are getting at.

Mr. Ashe: I have no illusions about that.

The Court: Of course, we have the problem here, as I see it, that in the cases under the Compensation Act where a man working for the United States on a vessel and who took a hammer, hit his finger and hurt himself, or got knocked out or fell down, got a concussion and hurt his head, and he wasn't able to take care of himself for several days, that there may be a very wild outcry if somebody working for the United States and whose duty it was to take care of these men didn't see to it that

(Testimony of Hilda Lier.)

the proper initial steps were taken so that they could get compensation.

Mr. Resner: I am prepared to answer that question.

The Court: I don't think that—I am only arguing that to point out that so far as this lady and these officials are concerned they were in all probability doing nothing more than performing their routine duties, without attempting to decide [17] whether or not the United States was liable or was not liable in connection with the matter; that still remains a legal question.

Mr. Resner: If your Honor please, I questioned that and the procedures were in line with what the Bureau had in mind, that is the shipyard people. May I direct your attention to Title 5 of the U.S. Code, Sections 765, 766 and 767. Now, it is true that Section 765 says every employee injured in the performance of his duty or someone on his behalf shall within forty-eight hours after injury give notice thereof to the immediate superior of the employee, and it states how it shall be given. Then 766, the requisites of the notice and, 767, the effect of failure to give—unless notice is given within the time specified or unless the immediate superior has actual knowledge of the injury, no compensation shall be allowed, but for any reasonable cause shown the Commission may allow compensation if the notice is filed within one year after the injury.

Now, it is obvious here everyone had notice, the Departments and the official superiors had notice,

(Testimony of Hilda Lier.)

the point being, your Honor, the way in which the Navy people rushed into this and sought to get compensation for these people was to preclude their asserting a claim for damages. That is our theory.

Mr. Collett: That is his theory.

Mr. Resner: It is something like a shipowner's claim man [18] who goes in and hands a seaman a release, "Here, sign this," gives him a few hundred dollars and that's the end of it. He might have a lot more coming to him.

The Court: Of course, that is provided you are assuming that these employees of the Compensation Department of the United States had some legal knowledge of the fact that they were doing some act here that the law didn't permit.

Mr. Resner: I don't see that, Judge.

The Court: A fraud upon these men, or something of that kind.

Mr. Resner: I don't see that. They, probably like this lady, are following their duties, but it is obvious that the people in charge know and the attorneys know and the Government itself knows the measure of its liability.

The Court: Well, of course, Mr. Collett says the Government has no liability, that is, that the Compensation Act is to take care of these people and there is no liability.

Mr. Resner: He says that, but the Supreme Court doesn't agree with him.

The Court: That is a question of law that you can present, but I don't think that we serve any

(Testimony of Hilda Lier.)

useful purpose in connection with the minor matter of questioning these employees of the Compensation Department about the preparation of these forms to go into that.

Mr. Resner: May I ask the lady several questions? [19]

* * *

Wednesday, June 21, 1950

Mr. Ashe: Call Mr. Gibbs, if your Honor please.

JAMES C. GIBBS

one of the respondents, called as a witness in his own behalf; sworn.

The Clerk: State your name clearly to the Court.

A. James Gibbs.

Direct Examination

By Mr. Ashe:

Q. You have a middle initial, Mr. Gibbs?

A. C.—James C. Gibbs.

Q. You are James C. Gibbs, one of the libelants in these consolidated cases involving an explosion on the United States Ship Antietam?

A. Yes.

Q. And you were upon the date of the explosion, November 19, 1946, in the employ of the United States and aboard that vessel? A. Yes.

Q. And you were injured as a result of the explosion on that vessel? A. Yes.

(Testimony of James C. Gibbs.)

Q. And consequently became a patient at the Marine Hospital in this city; is that correct? [72]

A. Yes.

Q. Will you tell us in your language what injuries you received as a result of that explosion?

A. I had a fractured left heel, cerebral hemorrhage, burns across the back, and miscellaneous bruises, and in the hospital I got a spinal that I still have the effects from.

Q. In other words, you received an injury to your back in the hospital; is that correct?

A. In the hospital.

Q. Now, Mr. Gibbs, I invite your attention first to a document in Government's Exhibit A-1 referred to by the Government as Form CA-1, and invite your attention to what purports to be a signature written in your behalf, and ask you whether or not it is your signature or that of someone other than yourself.

A. It is someone other than myself, not my own.

Q. On November 19, 1946, the date of this instrument, you were in the Marine Hospital; is that correct?

A. Yes.

Q. Were you in pain at that time?

A. Yes.

Q. You weren't submitted any of these documents, similar to the one I just exhibited to you for signature, were you?

A. No.

Q. You knew nothing of this document until I just showed it to you? [73]

A. No.

Q. You have been here for a couple of days. Do you know what the CA-1 form is now?

(Testimony of James C. Gibbs.)

A. Yes, I do.

Q. It has been described as an application for compensation. I ask you categorically, did you ever sign one in your life? A. No.

Q. Did you ever apply for compensation benefits from the Federal Employees' Compensation Act? A. No.

Q. Did you ever receive any compensation or sums of money which allegedly were given to you for the purpose of making payments under the act just described? A. No.

Mr. Collett: We will object to that as calling for a conclusion.

The Court: Strike it out.

Mr. Collett: It goes out?

The Court: Yes, I will sustain the objection to the last question. The answer may go out.

Q. (By Mr. Ashe): Did you at the time of this injury have accumulated sick leave? A. Yes.

Q. Do you of your own knowledge know presently what the amount of that accumulated sick leave was? [74]

A. It was approximately 58 to 60 days.

Q. Of accumulated sick leave? A. Yes.

Q. You had been an employee of the United States Government for how long prior to this accident? A. July 3, 1940.

Q. You worked continually as an employee of the United States in various capacities from that date to the date of your injury?

A. With the exception of about three months between May of '46 and September of '46.

(Testimony of James C. Gibbs.)

Q. Around the date of your accident, what was your assignment——

A. We were told to go into——

Q. I don't mean that. What was the nature of your work? Were you a welder or ship fitter?

A. Ship fitter.

Q. You were earning at that time what?

A. May I correct my statement? I was a ship fitter's helper at that time.

Q. At that time? A. Yes.

Q. Had you ever been characterized as a ship fitter and so named? A. Yes. [75]

Q. Had you worked in the capacity of ship fitter? A. Yes.

Q. Did you receive certain sick leave payments?

The Court: Did you want him to answer the question that you asked him when you got side-tracked, as to what his compensation was?

Mr. Ashe: Thank you, Judge, for helping me out.

Q. What were you making upon the date of the accident? A. \$9.04 a day.

Q. Did you become eligible for a raise in pay at some future date?

A. Immediately upon my being released from the hospital my rate as a ship fitter was approved; it had gone in the day before the accident.

Q. I show you a document in this same government exhibit referred to, A-1, a report of termination of total or partial disability, and ask you whether you have not already reviewed it with me while we were in court? A. Yes.

(Testimony of James C. Gibbs.)

Q. Do you recall my showing you this sheet where, in answer to question 13: "Has employee been paid for any portion of above absence on account of (a) sick leave? (b) sick leave?" It is stated certain days upon which you had received that sick leave pay. Did you receive those amounts?

A. Yes. [76]

Mr. Ashe: Mr. Collett, if you will state what that amount is, according to your records, we will accept that, of course.

Mr. Collett: November 20, 1946, to January 31, 1947, 424 hours, \$610.50. That is on account of sick leave with some three days of holiday pay. And from February 3, 1947, to March 7, 1947, 200 hours, advanced sick leave, \$288.

Q. (By Mr. Ashe): Does that sound correct to you, to the best of your memory?

A. No, I wouldn't say that is quite correct.

Mr. Ashe: You have \$100 of advanced sick leave?

Mr. Collett: That is right.

Q. (By Mr. Ashe): What is your best recollection, Mr. Gibbs?

A. Well, as I understood Mr. Collett, that was—I was given \$600 and some-odd dollars and then an additional \$200.

Mr. Collett: \$288, yes.

The Witness: Well, I will have to accept it, unless I figure it out. It doesn't figure out quite right.

Q. (By Mr. Ashe): When you were separated

(Testimony of James C. Gibbs.)

recently from the service of the United States you were given some accumulated sick leave or annual leave? A. Annual leave, yes.

Q. That was in the amount of two hundred odd dollars? A. Yes. [77]

Mr. Ashe: Could that be the figure to which you refer, Mr. Collett?

Mr. Collett: It could be. This is the amount of advanced sick leave from the records of the Navy; from February 3, 1947, to March 7, 1947, advanced sick leave, \$288, \$200.

Mr. Ashe: As represented by this report of termination which I have in front of me, Mr. Collett?

Mr. Collett: Report of termination.

Mr. Ashe: Here are the dates.

Mr. Collett: That is right.

Mr. Ashe: I don't mean to be argumentative at all.

Mr. Collett: Here is "3/7."

Mr. Ashe: It says "advanced sick leave from December 10 until March 7," isn't that what it says—from January 10th to February 10th——

Mr. Collett: February 10th—there wasn't room enough on that line. This line is "advanced sick leave, and this one, in accordance with the records as this document is made out, February 3rd to March 7th, is shown there. From November 20th to January 31st——

Mr. Ashe: We are agreed that that is the total amount of the sick leave and accrued leave given

(Testimony of James C. Gibbs.)

to this man in connection with this injury, is that correct?

Mr. Collett: That is all the information I have; you will have to agree with me on it. [78]

Mr. Ashe: This is what he got as a result of the injury?

Mr. Collett: This is what the records of the Navy show in accordance with your request, counsel, to compute these days as indicated on your list.

Mr. Ashe: I tried to make myself clear, in connection with this particular injury. I see there are other bits of information here, but with pertinency to this particular issue, he received \$288 and \$610.56, a total of \$898.50, is that right?

Mr. Collett: Mr. Ashe, so that there may be no question, you asked with regard to the respective periods of sick leave and advanced leave, and they are, to the best of my knowledge, as indicated by that document.

Mr. Ashe: I wouldn't hold you to any better knowledge.

Q. By the way, where did those payments come from, Mr. Gibbs?

A. From the San Francisco Naval Shipyard.

Q. Have you ever received any payment from any source other than the San Francisco Naval Shipyard? A. No.

Mr. Collett: Object to that and ask that it be stricken, because he received payments from some place; that is a pretty general statement.

Mr. Ashe: I am sure counsel understands me,

(Testimony of James C. Gibbs.)

and if he wants the record clearer, I will try and be more specific.

The Court. I don't understand what you are getting at. [79]

Mr. Ashe: My point is this: We wish to show to your Honor that we haven't taken any compensation payments at all.

The Court: Why don't you put it in the ordinary language?

Q. This is the only money you got as a result of this accident? A. Yes.

Q. That you didn't work for? A. Yes.

The Court: I will put it that way.

The Witness: Yes.

The Court: Then we all understand it.

Mr. Ashe: If your Honor please, on the basis of the testimony offered and upon the basis of Mr. Collett's, if I may characterize it, opening statement and because all of these men had taken compensation except Mr. Gibbs; upon the basis of the records introduced by the government in which they refer to the payments made to this man as sick leave and advanced sick leave; on the basis of the fact that the government file fails to reflect in any place a so-called CA-4 form, which was required to be signed by employees in order to become entitled to the benefits of the Federal Compensation Act, I now move to strike from the defendant's answer, with particular reference to the second and third separate and distinct defenses of that answer, paragraph III under that [80] heading:

(Testimony of James C. Gibbs.)

“That subsequent to said alleged injury libelant filed a claim with the Bureau of Employees’ Compensation of the Federal Security Agency for disability compensation as a result of said alleged injury; that said libelant was awarded disability compensation and received regular payments in accordance with said award.”

And I further move to strike paragraph IV of the same subsections of the defenses:

“That by virtue of libelant’s claim and acceptance of compensation and in accordance with the provisions of Title 5, USC Section 751, et seq. Libelant has erected his remedy thereunder and is barred from pursuing any other remedy that he might have had.”

The Court: What is the good of moving to strike it? If the government hasn’t sustained that defense, they haven’t sustained it. You do not strike a defense. What does that mean? A man comes in and he pleads in his answer that the action is barred by laches and he doesn’t prove that the action is barred by laches. He has not sustained his defense. I don’t understand what you mean by striking a defense.

Mr. Ashe: Probably in my own humble way it is a way of raising the question.

The Court: If it has not been established, then the defense has not been established, and I will find against him, [81] that is all.

(Testimony of James C. Gibbs.)

Mr. Ashe: I would like to have a stipulation to that effect, if Mr. Collett would be so kind, to save the time of the Court.

The Court: Is this the case that you referred to which raises another legal question different from the other cases, Mr. Collett?

Mr. Collett: If the Court please, I don't know if it raises another question; it is subject to all the defenses. In this case Mr. Gibbs, after his injury, had accumulated sick leave which he was paid, and then he was advanced 200 hours of sick leave which covered to the time that he went back to work, and at that particular point he had received complete pay during the entire period by virtue of the advanced sick leave. He had received his medical care and attention and hospitalization to the point that he was returned back to his former employment. So there was no need to file any compensation claim; he had received everything to which he was entitled under the Compensation Act. Now whether or not that is the equivalent of compensation or a satisfaction of the provisions of the Act, I wouldn't be prepared to say. That is a matter I should think that the Court would have to determine. I certainly wouldn't foreclose the government's point by entering into any stipulation.

The Court: What you are saying there is that whatever [82] relief this applicant was entitled to was under the Act and that he received that.

Mr. Collett: He received it, yes.

The Court: Would you bring out from the wit-

(Testimony of James C. Gibbs.)

ness the factual situation as to when he went back to work so we have a record of when he went back to work, and so forth?

Q. (By Mr. Ashe): Mr. Gibbs, when did you return to work?

A. I can't recall the exact date; it was approximately three months and a half after November 19th.

Q. When you returned to work, what sort of a job did you get?

A. Well, I was given a job where I could sit down at a desk.

Q. As a matter of fact, you returned to work on crutches and in a cast, did you not, sir?

A. Yes.

Q. And were you still continuing as an outpatient at the Marine Hospital in connection with your original injury? A. Yes.

Q. You were unable to carry on——

Mr. Ashe: I will lead for a while, Judge, if I may.

The Court: That is all right.

Q. (By Mr. Ashe): You were unable to carry on those activities which you fulfilled prior to the explosion? A. Yes.

Q. As a matter of fact, you have never returned to the job of ship fitter with all its attendant duties, have you? [83] A. No.

Q. You have occupied jobs which have made it possible for you to work easier and lighter, is that correct? A. Yes, sir.

Q. Are you still working for the Navy?

(Testimony of James C. Gibbs.)

A. No.

Q. When did you separate from the Navy?

A. I believe it was May 28th of this year.

The Court: Of this year?

A. Yes.

The Court: In the jobs that you had—do you mind if I ask this——

Mr. Ashe: Please, Judge, of course.

The Court: In the jobs that you have had since you have been back with the Navy, what did you receive by way of compensation as compared to the compensation you were receiving prior to the accident?

A. The same wages.

Q. (By Mr. Ashe): In other words, lighter work for equal compensation? A. Yes.

The Court: Up to the time that you went back to work on crutches, as you have testified to, up to the time that you went back to work, had you received pay for all of the period that you were in the hospital and incapacitated, [84] by way of sick leave and advanced sick leave?

A. Yes.

Q. Just as if you had been at work?

A. Right.

The Court: All right; I get that.

Mr. Ashe: And I would respectfully show to the Court that Mr. Collett's conception of sick leave as one of the benefits of the Federal Employees' Compensation Act is open to considerable doubt, but I do not wish to argue that legal point at this time.

The Court: You can take that up later.

(Testimony of James C. Gibbs.)

Mr. Ashe: Now Mr. Collett wants to cross-examine.

Cross-Examination

By Mr. Collett:

Q. I thought Mr. Ashe left off a little bit in the air. Getting back to that question I will ask, what were the circumstances surrounding why you went back on crutches?

A. The reason I went back on crutches, I received a letter from the master of our shop informing us—informing me that if I so desired I could come back to work; that duties I could handle would be given to me.

Q. Duties that you could handle would be given to you? A. Yes, sir.

Q. And you felt that that was in accordance with what you wanted to do, did you? [85]

A. I would much rather to be doing something than sitting around in a cast.

The Court: I think you mentioned to me—I may be in error; I think you are the same witness—that you requested the job to get away from the hospital?

Mr. Resner: That was Dimatteo.

Mr. Collett: That was Dimatteo.

The Court: That was the other witness; I am sorry then.

Redirect Examination

By Mr. Ashe:

Q. If Mr. Collett is through, I have one other question, Mr. Gibbs. You are married?

(Testimony of James C. Gibbs.)

A. Yes.

Q. You have a family? A. Yes.

Q. You live now at Redwood City, is that correct? A. Yes.

Q. At the time of this accident you lived in the city and county of San Francisco? A. Yes.

Q. Who is in your family, Mr. Gibbs?

A. Wife and two children.

The Court: Is there anything else you want to ask?

Q. (By Mr. Collett): The offering to you of an opportunity to go back was in the spirit of cooperation and to help you, [86] is that so?

Mr. Ashe: We will object to that. He is characterizing the actions of someone over there. It was more, in the nature, I should say, of a voluntary offer.

The Court: I think the objection is good. Sustained.

Mr. Collett: No further questions.

Mr. Ashe: You may step down, Mr. Gibbs.

Mr. Collett: Thank you very much. [87]

January 5, 1951.

JAMES C. GIBBS

one of the libelants, recalled, upon being duly reminded he was still under oath, testified as follows:

Further Cross-Examination

By Mr. Bergman:

Q. Mr. Gibbs, you testified, I believe, at the former hearing on this matter that you first went to work for the Government in the year 1940, is that correct? A. Yes.

Q. You transferred, I believe, from wherever your position was—I think it was Mare Island—to the San Francisco Naval Shipyards in the year 1946? A. Yes.

Q. Some time during the course of your employment, from the year 1940 until the year 1946, you received certain information with respect to your rights and privileges under the Federal Employees' Compensation Act, did you not? [2*]

Mr. Ashe: "Certain information" sounds rather indefinite, your Honor.

Mr. Bergman: It is not too vague, your Honor, as a preliminary question as to the matter of the libelant's knowledge.

The Court: Overruled.

A. Well, that information, just what type of information are you referring to?

Q. (By Mr. Bergman): Well, you learned, did you not, among other things, that if you were injured in the course of your employment and could

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of James C. Gibbs.)

not work on that account you would be entitled to certain payments of money from the Government?

A. Not to my knowledge. Oh, yes, certain payments a month.

Q. That's right? A. Yes.

Q. You also knew, Mr. Gibbs, that in such an event, that is, injury in the course of your employment, you would receive free of cost to you hospital services by the government, did you not?

A. I never got this information and any literature of anything like that, to my knowledge, but that was general knowledge, yes.

Q. You knew that? A. Yes.

Q. You knew also that in such event you would be given the [3] services of physicians at no expense to you? A. Yes. Yes, that's true.

Q. How did you learn that?

A. Well, through general knowledge. I can't recall receiving any definite literature stating that, but it was generally understood whenever you're hurt they will give you medical care.

Q. At the time you transferred to employment at the San Francisco Naval Shipyards you either were or had been a supervisor in the past, is that not right? A. Yes.

Q. Among others, one of your duties was to impart at least some general information with respect to the privileges of civil service employees to men under you, didn't you? A. Yes.

Q. I will hand you, Mr. Gibbs, an instrument, respondent's exhibit D-1, I believe it is, or I-1,

(Testimony of James C. Gibbs.)

containing the words at the top "Employee's Notice of Injury," and ask you to examine the signature at the bottom. (Handing to witness.)

A. Right.

Q. That's your signature, isn't it?

A. Yes.

Q. Will you examine the lower left-hand corner of the page, please?

A. Right. [4]

Q. That's a CA-1 form, is it not?

A. Yes.

Q. Do you recall having testified on your direct examination that you never in your life signed one of those forms?

Mr. Ashe: Now, counsel, let's look at the date of this thing, and you will find it is after the accident by many months. Let's establish the date, please. At the time he testified he hadn't signed that form. Isn't that the fact, Mr. Gibbs?

The Court: I think you'd better let the examination proceed, then.

Q. (By Mr. Bergman): I believe the last question was whether or not the witness recalled testifying never in his life he signed such a form.

A. I don't recall using those exact words. If I did, why, that's true.

Mr. Ashe: If your Honor please, if this is for the purpose of impeachment, the least he could do is exhibit his former testimony to him and lay the foundation.

The Court: Yes, that is a good objection. If he did so testify, he should be shown the testimony or it should be read to him.

Mr. Bergman: I will read, your Honor, from the transcript which I received of the hearing held

(Testimony of James C. Gibbs.)

commencing 19 June. It is on page 73 of this transcript, and is the questioning of the [5] witness by Mr. Ashe and referring to documents in general and particularly CA-1. The questions are these:

“Q. You weren’t submitted any of these documents similar to the one I just exhibited to you for signature, were you? A. No.

“Q. You knew nothing”——

The question before that, I’m sorry. This is by Mr. Ashe:

“Q. Now, Mr. Gibbs, I invite your attention first to a document in Government’s exhibit A-1, referred to by the Government as form CA-1, and invite your attention to what purports to be a signature written in your behalf, and ask you whether or not it is your signature or that is someone other than yourself?

“A. It is someone other than myself, not my own.

“Q. On November 19, 1946, the date of this instrument, you were in the Marine Hospital, isn’t that correct? A. Yes.”

There your Honor will recall the discussion was with reference to a notice of injury of the particular accident involved in this case.

“Q. Were you in pain at that time?

“A. Yes.

“Q. You weren’t submitted any of these documents [6] similar to the one I just exhibited to you for signature, were you?

(Testimony of James C. Gibbs.)

“A. No.

“Q. You knew nothing of this document until I just showed it to you? A. No.

“Q. You have been here for a couple of days. Do you know what the CA-1 form is now? A. Yes, I do.

“Q. It has been described as an application for compensation. I ask you categorically, did you ever sign one in your life?

“A. No.

“Q. Did you ever apply for compensation benefits from the Federal Employees' Compensation Act? A. No.”

That is all I am getting at, your Honor.

Mr. Ashe: Your Honor, I hate to interrupt my brother. There is the document you just showed him. We haven't yet got the date of it, so it will be clear in your Honor's mind the answer to my question at the earlier hearing was proper and true, that up to that time he had not signed an application for compensation or notice of injury.

The Court: That is just arguing the weight of the witness' testimony. You can take him over on further [7] examination.

Mr. Bergman: I don't regard the matter as having substantial bearing on the issues of this case, your Honor. It happens that the notice to which the witness has just testified is dated on its face the 12th of July, 1948. It involves an injury

(Testimony of James C. Gibbs.)

separate and apart from the one involved in this suit.

Mr. Ashe: In which case, I object to it being irrelevant, incompetent, immaterial, inadmissible, having no pertinency to the issues of this case.

The Court: It bears on the knowledge of the witness.

Overruled.

Q. (By Mr. Bergman): What in general, just briefly, was the reason why you signed that notice?

A. Well, it's self-explanatory. I scratched my hand and I went to the dispensary. Now, this is a standard form that they give you before you can receive any type of medical attention. This is given to you whether you go there for a scratch or a serious injury or whatever it is.

The Court: That was about seven months after the Antietam explosion?

Mr. Bergman: No, it's 1948, your Honor.

The Witness: About two years after, I imagine.

The Court: It was about——

The Witness: Two years and a half. [8]

The Court: Two years?

The Witness: Two years and a half.

The Court: A year and a half after the accident. The Antietam explosion was in November, 1946.

The Witness: A year and a half, yes.

Mr. Bergman: November, 1946.

Q. Now, as you say, Mr. Gibbs, this is a form which they give you when you go the the dispensary or the hospital or something like that?

(Testimony of James C. Gibbs.)

A. At the dispensary, yes.

Q. You know it is necessary to make out papers of some kind when you *go the* dispensary or the hospital, then? A. Yes.

Q. You had known that for some years prior to November, 1946, had you not? A. Yes.

Q. You also knew that if you were in such a position where you could not physically make it out someone else would make them out for you?

A. No, I did not.

Q. You knew at the time you were in the Marine Hospital in November, 1946, that you were there at the expense of the Government? A. Yes.

Q. You had no intention of ever paying it yourself? [9]

Mr. Ashe: Objected to as argumentative.

The Court: Well, that objection is good. The objection to the last question is sustained.

Q. (By Mr. Bergman): You knew that papers of some general nature would have to be made out to get you in the hospital?

A. I wasn't concerned about it at the time. I didn't know what the procedure was to get me in there or anything. That was never explained to me.

Q. Why were you not concerned about the papers?

A. Well, at that time I wasn't concerned about much of anything except alleviating my pain. That was my big concern at that time.

Q. You are talking about your then physical condition? A. That's true.

(Testimony of James C. Gibbs.)

Q. When did you learn that when a civil service employee is injured and must go to the dispensary or the hospital he must make out a notice of his injury?

A. That I knew probably from about 1940—about the dispensary. I knew nothing about the hospital. I was never connected in any way with a hospital up to this time.

Q. As a supervisor had you ever had occasion to see that such a notice was made out for another man who was injured?

A. No. All a supervisor does, they have a foreman there that gives a man permission to travel from his work to the dispensary. The time that he leaves is on there; the time that [10] he spends at the dispensary is noted on there; and the time that he returns to work is noted on there. But as far as these forms that you just showed me—I forget the number of it—we are not informed about that at all. And if you care to—I still have a—the course that I took in the supervision over there—and there is no mention of any forms or procedures of injury indicated in that course at all.

Q. But you did know as early as 1940 it was necessary to make out a notice of injury?

The Court: He already said that.

The Witness: Yes.

Q. (By Mr. Bergman): Did you know that it could be made out by someone other than the man himself? A. No.

Q. You did not know that? A. No.

(Testimony of James C. Gibbs.)

Q. Had you known of instances where men were seriously injured and that they were physically incapable, as you were in this case, of making out any forms and immediately were sent to the hospital?

A. No, I never happened to be around anyone that was hurt that seriously.

Q. How many times would you estimate, as well as you can remember, how many times would you say that you had been to a government dispensary in the course of your years of work [11] for the Government?

A. That's kind of hard for me to say with any accuracy, but I remember of two instances prior to 1946.

Q. Did you make out notice of the injury on the occasion, whatever it was?

A. I don't remember what type of form we had to make out for that.

Q. When you were sent to the hospital on the occasion of the injury involved here, Mr. Gibbs, you were conscious then, were you? A. Yes.

Q. As a result of your injury, do you recall, first, whether or not you were rendered unconscious? Were you rendered unconscious at the time of your injury?

A. I believe so. That is kind of hazy right now. Do you want me to go into that? I will.

Q. I want your estimate of how long you might have been rendered unconscious.

A. I don't know. It might have been five seconds

(Testimony of James C. Gibbs.)

and it might have been five minutes. I really don't know.

Q. But you were at least conscious by the time that you got to the hospital? A. Yes.

Q. And in severe pain?

A. What's that? [12]

Q. And in severe pain? A. Yes.

Q. How long, as well as you can recall, did you stay in the hospital?

A. At the Marine Hospital?

Q. Yes. A. I was there fourteen days.

Q. You knew during the time that you were in the Marine Hospital, of course? A. Yes.

Q. You knew that it was a Government hospital, of course? A. Yes.

Q. You knew also, did you not, that your hospital and medical services were being furnished at the expense of the Government? A. Yes.

The Court: He already said yes to that before. As I understood his testimony, he said he understood that. Isn't that right?

The Witness: Yes.

Mr. Bergman: I'm sorry, your Honor.

Q. During the time you were in the hospital did you ever have a conversation with any of the civil service personnel employees at the Navy Yard with reference to your rights under the Compensation Act? [13] A. No.

Q. Did you ever have a conversation about your rights under the Compensation Act at any time be-

(Testimony of James C. Gibbs.)

tween the time when you were injured and you returned to work?

A. Yes. About, oh, ten or eleven months after the accident I went to the——

Q. Excuse me, Mr. Gibbs. I meant to say——

The Court: He said between the time you went to the hospital and the time that you returned to work after you were in the hospital did you have any conversation with any person—did you say?

Mr. Bergman: With any of the civil service employees at the Navy Yard with respect to your rights under the Compensation law? A. No.

Mr. Ashe: I am quite certain that he doesn't mean to make the question that broad, because a lot of people are civil service employees of the Navy. I think the question should be reframed, if that is the intent of the question. It is those who supervise the Bureau of Employees' Compensation.

The Court: He said he didn't have any conversation with any civil service employees. That should cover it.

Mr. Ashe: I would like the witness to appreciate it. He might have talked to a civil service employee.

The Witness: About compensation, no. [14]

The Court: He said, "About compensation, no."

Mr. Bergman: I thought I said civil service personnel office people at the yard who handled such matters.

A. No, I had no discussion with anyone about compensation while I was in the hospital, up to the time I returned to work.

(Testimony of James C. Gibbs.)

Q. Did you have a conversation with any of the employees at the shipyard there in the personnel office who handled your personnel records and so on with reference to the sick and advance leave that they gave you?

A. Just how that came about, about three weeks after I got hurt a fellow by the name of Mr. Ira Ray came to the house, and they had already arranged to pay me sick leave. Now, I didn't have any conversation with him prior to that time, no.

Q. You had a conversation with whom?

A. Ira Ray.

Q. And then I believe you said they had already arranged, or words to that effect? A. Yes.

Q. Your conversation was with Ira someone?

A. Yes. Ira Ray.

Q. Where was the conversation held?

A. At my home.

Q. As well as you can recall, what did you say to him and what did he say to you about that particular matter?

A. The principal reason he came to the house was to give me [15] a paper approving my rate and then he mentioned that if I wanted to they would carry me on sick leave until I returned to work. That's the way he put it, as near as I can remember. That's been about four years ago.

Q. Did you then have any annual leave to your credit? A. Yes.

Q. Do you recall how much?

A. I really don't recall how much. It couldn't

(Testimony of James C. Gibbs.)

have been very much because I had only been there a short time.

Q. He told you then they would advance you sick leave? A. Not then.

Q. Oh. Were you ever told that they would advance you sick leave?

A. After I had been off about two and a half months they told me that they would, yes.

Q. Do you remember with whom such a conversation might have been held then?

A. I believe that Mr. Barr, the master of Shop 11, and Ira Ray were both involved in that conversation.

Mr. Ashe: Would you be kind enough to spell that last name? I don't think either counsel or I are getting it. A. Ira—I-r-a—Ray—R-a-y.

Q. (By Mr. Bergman): Were you also told at that time that you could take monthly compensation payments instead of advance sick leave? [16]

A. No, not to my knowledge. I don't recall that at all.

Q. Do you know that you could take monthly compensation benefits if you desired?

A. No, I didn't—if I didn't have the sick leave, I could take compensation, yes.

Q. Did you know at that time that if you desired you could take monthly compensation?

Mr. Ashe: I now object, your Honor, on the grounds it is incompetent, irrelevant, immaterial, because as already has been decided by your Honor,

(Testimony of James C. Gibbs.)

he didn't accept compensation benefits and therefore it is irrelevant.

(Argument on the objection.)

The Court: Well, I don't quite see what the materiality of that would be. If there was no acceptance of compensation payments—there isn't any doubt that the witness has testified to that, and I think that he may also have so testified at the other hearing. I am not too clear on that. He did know that he was entitled to get hospital, doctor's services from the Government, and he did receive that. Now the problem that is presented by that testimony is whether or not that constitutes an election of remedies. He couldn't have an election of remedies by virtue of the fact that he didn't take compensation but only by virtue of the fact that he did.

Mr. Bergman: I believe your Honor points out the relevancy of my last question. I can't prove his mental process [17] but I would like to show what he knew.

The Court: He has already testified that he knew that he was entitled to——

Mr. Bergman: Compensation.

The Court: ——compensation, and also to hospital and doctor services, and the evidence is that he did receive doctor services and hospitalization but did not take any compensation. I think that is fair——

Mr. Bergman: That is sufficient——

(Testimony of James C. Gibbs.)

The Court: That is clear. There isn't very much question about that.

I will say that in order—I see there is a little confusion in counsel's mind and perhaps it might be well to clarify that right now. The reason that I said in the opinion that either side could offer further evidence on the subject of remedies was because I did not know whether or not either side might want to offer some kind of evidence of which I was unaware. That is the only reason I put that in. I don't think there is any dispute about the factual aspects of that matter but there might have been some further evidence either side might have wanted to put in and I didn't want to foreclose either side on that. That's why I put that in the opinion. But so far as the record is concerned, I don't think there is any doubt, from what the witness says today and as my recollection is of his testimony before, that he knew that he was [18] entitled to get doctors and hospitalization and also compensation. He did receive hospitalization and doctors' services, but not compensation, except that he got his sick leave.

The Witness: Yes.

The Court: I think that is a fair statement of the record.

Mr. Ashe: Yes, your Honor. I think I practically conceded that when I spoke earlier.

The Court: There still remains the question, legal question, as to whether or not under the circumstances the receipt and acceptance of hospital-

(Testimony of James C. Gibbs.)

ization and doctor services constituted an election of remedies.

Mr. Bergman: Yes, your Honor.

The Court: That is the same as I said before, but I thought it would be best in this particular case, because of the fact that this plaintiff did not receive compensation, to defer the determination of that question until the whole case was heard.

Mr. Ashe: That's right.

Mr. Bergman: That is a matter on which I do wish to be heard and submit authorities to the Court.

The Court: Of course, I think you are pretty much going over—I am not too certain about it because I haven't read the record—you are somewhat going over some of the testimony that was already offered. [19]

Mr. Bergman: I appreciate that. I may have, to some extent, your Honor.

The Court: If there is anything you wish to bring out, go ahead and do it. It has been a long time since we had the other testimony and there may be some matters that weren't brought out.

Q. (By Mr. Bergman): Mr. Gibbs, when you were told that you could be advanced sick leave, had you already commenced suit for damages against the Government? A. No.

Q. Had you determined to do it?

Mr. Ashe: Objected to as incompetent, irrelevant, immaterial, not pertinent to the issues.

(Testimony of James C. Gibbs.)

The Court: What time are you referring to? You said, "Had you already."

Mr. Bergman: The witness testified, I believe, that shortly prior to the time he went back to work, at least some time before he went back to work, he was told that he could be advanced sick leave.

The Court: Is that the time you are referring to?

Mr. Bergman: Yes.

Mr. Ashe: Did your Honor rule against me on that?

The Court: The suit was filed in December of 1947. That is a year afterwards.

Mr. Bergman: The suit was filed much before that, and [20] that's——

Mr. Ashe: As I recall, it was just about—well, just about made the statute of limitations under the Federal Tort Claims Act.

The Court: It was filed under date of February 14, 1947.

Mr. Bergman: The present title was filed September 23, 1946, and I presume the filing date dates back——

Mr. Ashe: I am afraid counsel is confused.

(Further argument on the filing date.)

Mr. Bergman: Perhaps I was confused as to the dates.

The Court: Let's get the date clear. The accident occurred——

Mr. Ashe: November, 1947.

(Testimony of James C. Gibbs.)

The Court: November, 1946. After he left the hospital the witness testified as to the conversation about getting his sick leave.

The Witness: Yes.

The Court: Have you fixed the time of that? Approximately what was the date of that?

Mr. Bergman: As I understand it, he returned to work March 10th.

The Court: That is right.

The Witness: Do you mind if I try to explain a little, your Honor?

The Court: No, no. Let's try to answer our questions. [21]

Mr. Bergman: My memory tells me pretty positively, based on the record, the date of the injury was the 19th of November, and returned to work March 10th.

The Witness: Well, that—I don't recall the exact date, but that's—

The Court: Approximately that time?

The Witness: Yes.

The Court: Now, with respect to the time that you returned to work, when was this conversation about getting the advanced sick leave?

A. That was about a month prior to the time I returned to work.

The Court: All right. Now, at that time, the attorney wants to know, did you then have—had you then determined to file suit against the Government?

A. No.

(Testimony of James C. Gibbs.)

Q. (By Mr. Bergman): Isn't that correct?

Mr. Ashe: To which we object; asked and answered.

The Court: He says, "No."

Q. (By Mr. Bergman): May I direct your attention to respondent's exhibit A-1 and in particular to——

Mr. Ashe: Will you be kind enough to let me see these things?

Mr. Bergman: I am sorry.

Q. ———copy of a letter dated 9 December, 1947, which purports to [22] be from you to the Bureau of Employees' Compensation?

Mr. Ashe: The date of this letter is December 9, 1947?

Mr. Bergman: Yes.

The Court: Is it already in evidence?

The Clerk: Yes, your Honor, Respondent's A-1 in evidence.

Q. (By Mr. Bergman): To refresh your memory, then, if I may read the letter—it is dated December 9, 1947, to the Bureau of Employees' Compensation.

(Reading:)

"Sirs:

"I was hospitalized in the U. S. Marine Hospital, San Francisco, California, and was treated as an out-patient until about November 1, 1947. I was first admitted for treatment on November 19, 1946, after having received

(Testimony of James C. Gibbs.)

fracture of the left heel, burns and bruises in explosion while working at the San Francisco Naval Shipyard, Hunters Point. It will be very much appreciated if you grant U. S. Marine Hospital, San Francisco, permission to supply us with a complete abstract of my diagnosis, treatment and so forth, which information I intend to use for legal purposes.

"Thanking you very much for your courtesy in this matter, I am,

"Very truly yours,

"JAMES C. GIBBS." [23]

Q. Now I want to ask you, Mr. Gibbs, if you meant by the words "legal purposes" use in connection with this suit? A. Yes.

Mr. Ashe: Counsel will forgive me, but so we will get these things done as we go along, may I respectfully point out, your Honor, that we filed the suit November 14, 1947.

The Court: This letter was written after the suit was filed.

Mr. Bergman: All right.

Q. You intended the papers for use in this suit?

A. Yes.

Mr. Ashe: And, as a matter of fact, they were never granted, counsel.

Mr. Bergman: But you did not see fit to advise the Bureau of Compensation that you were suing them?

Mr. Ashe: Objected to as incompetent, irrelevant and immaterial.

(Testimony of James C. Gibbs.)

The Court: Yes, sustained.

Mr. Ashe: The suit was on file in the District Court and the U. S. Attorney was notified.

Mr. Bergman: Then I shall ask this question:

Q. Why did not you advise the Bureau of Employees' Compensation in that letter that you were going to sue?

Mr. Ashe: Just a minute; objected to as incompetent, irrelevant and immaterial. [24]

The Court: I don't see any competency, that he had already brought suit against the U. S. He wanted to get a look at the records there in the hospital in connection with that suit. What difference does it make whether he advised them? The U. S. had already been sued.

Mr. Bergman: I think before the matter is concluded, as it will be, I think I can point out to your Honor a very substantial materiality.

The Court: What is your point?

Mr. Bergman: In answer to the letter which I just read—perhaps I ought not say—in answer to the letter—on the theory it is my personal conclusion—but the letter I just read was December 9, 1947, to the Bureau of Employees' Compensation. There is a letter to the claimant dated January 12, 1948, which I will just read and state what the respondent states is the conclusion therefrom.

(Reading:)

“Reference is made to your claim because of the injury you sustained on November 19, 1946,

(Testimony of James C. Gibbs.)

while employed by the Navy Shipyard, San Francisco, California.

"It is noted in a report dated October 13, 1947, from the U. S. Marine Hospital in San Francisco, that they desired you to return in three months for re-examination, and if you have not already done so, it is suggested that you return [25] at this time. You may present the inclosed form CA-33 as your authorization.

"In order that further consideration may be given to your request for medical information regarding the above injury, it is requested that you advise this office more fully as to the purposes this information is needed."

The respondent's contention is that the absence indicated on the face of this letter of anything with respect to a suit is particularly singular. And not a thing is mentioned about it.

Mr. Ashe: I still——

Mr. Bergman: I want to follow this up by showing that the libelant reported to the hospital and that——

Mr. Ashe: I will save counsel a lot of time. Whatever is in that record that showed he was there and got treatment, I will say that it's in there, and we don't have to argue about these things. However, I will certainly object to any conclusions on the part of counsel.

Mr. Bergman: I don't wish to be so presumptive. It's not my conclusions. I only offer the instruments for what they are worth.

(Testimony of James C. Gibbs.)

I will next show, if I may, that in response to his first letter, the authorization for treatment——

The Court: You are endeavoring to show that the libelant [26] had treatment at the hospital after he brought the suit against the Government, is that the point?

Mr. Bergman: Yes, sir.

The Court: What is the materiality of that?

Mr. Bergman: It would have exactly the same materiality in the mind of counsel for the respondent in the case of following filing the suit libelant decided to take monthly compensation benefits and did—the fact that the suit was filed doesn't mean what he did with reference to the Compensation Bureau subsequent to that time.

The Court: Was this treatment he got after he filed suit for the injuries that were incurred in the matter in 1946?

Mr. Ashe: Always in connection with the same injury, there is no question about that.

The Court: Why don't you put in evidence or read into the record, whatever you want, on the subject of the nature of the treatment or services that the libelant had at the hospital after he filed the suit? It might have some legal bearing, I don't know—but get it in evidence first.

Mr. Bergman: These two instruments, which I hand counsel, together with a letter of transmittal, are not yet in evidence.

I ask counsel if he has any objection to them being offered?

(Testimony of James C. Gibbs.)

Mr. Ashe: I have no objection to anything that came out of the Marine Hospital. Of course not. It's apparent from [27] this, when they sent the record over during our first trial they meant to include these two documents. No objection.

Mr. Bergman: May they be marked? I offer them.

The Court: Very well.

The Clerk: Respondent's Q, R and S introduced and filed in evidence.

(Letter of transmittal dated December 21, 1950, Federal Security Agency, U. S. Marine Hospital, San Francisco, to U. S. District Court marked Respondent's Exhibit Q. Form CA-33, dated January 12, 1948, marked Respondent's Exhibit R. Form CA-16, dated November 19, 1946, marked Respondent's Exhibit S.)

Q. (By Mr. Bergman): I hand you an instrument, Mr. Gibbs, Respondent's Exhibit R, entitled at the top "Request for treatment of injury under the United States Employees' Compensation Act," and ask you if you recognize that?

The Witness: Yes.

Q. You took that up to the Marine Hospital, did you not, some time in January, 1948?

A. Yes.

Q. You saw a Dr. Bilafer, did you not?

A. I don't recall the doctor's name.

(Testimony of James C. Gibbs.)

Q. You were given some treatment with reference to your foot, were you not?

A. No. [28]

Q. What happened at the hospital, do you remember?

A. Yes. I am sure this is the right one here (indicating). After I wrote that letter you are talking about there for my request of my medical records, they sent me this form here with a letter that I should go out there and be reexamined but not for treatment.

I went out and I saw, I believe it was Dr. Wagner. I can't recall exactly who it was. And they made an appointment for me to see this doctor here. He's a bone specialist, and that was the purpose of that. I am sure that the Bureau that sent this knew by that time I had a suit filed and they were interested in establishing the extent of the injury and they had a specialist there for that examination. I am sure that's all that it was for. But I did not receive any treatment, other than the examination, that's all.

Q. Was it not recommended at that time that special shoes be made for you?

A. No. The doctor at that time read the report of Dr. Wagner and he had already recommended—I forget the medical name for it—a fusion of the joint there to relieve the pain, and he also recommended that that be done if the pain gets too severe.

Some time later—oh, it may have been a year or so later—I was out to see Dr. Wagner and he didn't

(Testimony of James C. Gibbs.)

recommend a [29] special shoe exactly, but he showed me how to put a pad under different sides of the shoe to relieve the pressure, that's all.

Q. It was not a special shoe? A. No.

Q. And a special shoe was not made for you by the government? A. No.

Q. At no time?

A. No. They made me an arch support out of some kind of padding. I don't know exactly.

Q. To refresh your memory I will hand you Respondent's A-1 and direct your attention to what purports to be your letter to the Bureau of Employees' Compensation dated March 20, 1948. You there call attention to the fact, do you not, that you have certain attorneys representing you?

A. Yes.

Mr. Ashe: We will stipulate, your Honor, that we represented him then and we are representing him today.

Mr. Bergman: However, the question and answer is in the record, I presume.

Q. Had you ever at any time prior to the time of that letter called attention to the fact that these counsel were representing you in your suit against the Government?

A. No—other than what is in that other letter; I told them it was to be used for legal purposes.

Q. Legal purposes? [30] A. That's all.

Q. I don't believe this question has been answered. When did you decide to bring this action against the Government?

(Testimony of James C. Gibbs.)

Mr. Ashe: Objected to, your Honor, as being incompetent, irrelevant, immaterial and certainly not pertinent to the issue of the election of remedies, which is before the Court. The facts speak for themselves. The case was filed on a certain day.

The Court: I will overrule the objection.

The Witness: You have tried to find the workings of my mind in this thing. I would like to explain to you exactly how my mind worked in this deal.

The Court: Well, he wants to know—if you can—if you can't answer the question, then you can't answer it. But the question is, when did you decide to file the suit; was that after you consulted the lawyers or before?

The Witness: No. I believe they filed the suit the same day I was up to see him—Mr. Ashe did.

The Court: Was that at or about the time or very shortly prior to the time that you filed the suit? Was that the time you decided to file suit?

The Witness: Yes.

The Court: You filed this suit in November, 1947, about a year after the Antietam explosion?

The Witness: Yes. [31]

The Court: Now, after you filed the suit, did you at any time receive any further treatment, of any kind, at the Government hospital, for the injuries which you sustained in the Antietam explosion?

The Witness: Not to my knowledge, no, sir.

The Court: Well, you would know if you did.

(Testimony of James C. Gibbs.)

The Witness: Other than this, that he brought up here, that's all.

The Court: You say you went there just for an examination at that time?

The Witness: Yes.

The Court: Did you ever receive any treatment of any kind——

The Witness: No.

The Court: Any medical treatment or out-patient treatment of any kind?

The Witness: No.

Q. (By Mr. Bergman): Never received any treatment subsequent to November, 1947?

The Court: That is the date when the suit was filed.

The Witness: No, I don't believe so. That's got me a little bit confused. I will have to go with the record there. I don't know just when I was an out-patient there. A year after I—I'm sure I never returned any more than that time.

Q. (By Mr. Bergman): Don't you remember, Mr. Gibbs, that in [32] June of 1950 you went out to the Marine Hospital and told them you had been laid off at the shipyard; that you tried private work but you couldn't work because of the injury to your foot and you wanted to know if there was anything further they could do for you?

A. No, I did not ask them that.

Q. You were at the hospital in June, 1950?

A. I was sent out there by Mr. Ashe for an examination this case here.

(Testimony of James C. Gibbs.)

Q. Who did you see then?

A. Dr. Wagner.

Q. Did you tell Dr. Wagner that you were being sent out by Mr. Ashe to secure information in connection with this suit? A. Yes.

Mr. Ashe: May I intercede with just this one question. That was in connection with the hearings that we had prior here before Judge Goodman.

Mr. Bergman: Objected to as leading.

The Witness: Yes.

Mr. Bergman: Counsel states that rather than the witness.

Mr. Ashe: Let's not be technical.

The Court: We are moving a little slow. Can't we get through with this evidence?

Mr. Bergman: I hand counsel authenticated copy of a treasurer check of the United States drawn to Dr. R. A. Bilafer, [33] U. S. Government voucher No. 4044 properly authenticated. Offer it in evidence.

Mr. Ashe: You know there are three documents here, do you? You offer all three?

Mr. Bergman: I will offer the entire document.

Mr. Ashe: One refers to the \$20 paid to Dr. Bilafer. There is another in here in another amount. Are you offering that, too?

Mr. Bergman: That would appear to me to be a voucher for bills for expenses in addition to that represented by the check.

Mr. Ashe: Does the name Mr. Gibbs appear anywhere on there? I don't see that it is connected with

(Testimony of James C. Gibbs.)

Mr. Gibbs in any way, do you, on the face of it? I will object to it unless you tie it up to Mr. Gibbs. I don't know anything about this \$192.40.

Mr. Bergman: This exhibit, your Honor, purports to be a photostatic copy. There is a photostatic copy of a treasurer's check drawn to a Dr. Bilafer for \$20. There is a voucher which has a stamp "4044" which states on it "James C. Gibbs, out-patient file" and the amount \$20.00. Attached to that same instrument is a photostatic copy of a voucher No. 4044. Now, I think it is fair to assume that \$20 was charged to the account of Gibbs and that the other amount of \$192.40, to which counsel calls attention, was for some other expense. [34] I can't state that the whole \$192.40 went for the expenses of Gibbs. I don't offer it for that purpose.

The Court: Are these payments made by the Compensation Commission to the Marine Hospital?

Mr. Bergman: To Dr. Bilafer.

The Court: He was a doctor for the Marine Hospital?

Mr. Bergman: Yes, sir.

The Court: Ordinarily the Compensation Commission would not give checks to the Marine Hospital, would it?

Mr. Bergman: No. That is as I stated.

The Court: This is to a private doctor?

Mr. Bergman: That is my understanding.

Mr. Ashe: They sometimes have assistants come in as consultants. That's a perfectly proper charge. I don't have any objection to that.

(Testimony of James C. Gibbs.)

The Court: Then why are you taking time on this to show the value of services?

Mr. Bergman: I don't offer it any more than to show Dr. Bilafer received \$20 fee for having seen the witness.

The Court: On what date, does it say?

Mr. Bergman: There is no date, except on the check itself, which is apparently the 27th of December, 1948. The date of the voucher is December 1, 1948.

Mr. Ashe: May I humbly suggest that counsel make reference to the medical records where it will appear what time Dr. [35] Bilafer saw this gentleman. There will be a reasonable time between that and the payment. I will concede Dr. Bilafer the \$20 for seeing Mr. Gibbs as a consultant, and I have no objection to it going into evidence. The thing I object to again is \$192.40.

Mr. Bergman: Well, there is in evidence this clinical record out-patient card. It has the name Dr. Bilafer. It is dated March 9.

The Court: March 9, what year?

Mr. Bergman: '48.

Mr. Ashe: Counsel, I am not asking you for doctors or anything else. I concede this to you. The \$20 was paid ostensibly because Dr. Bilafer was kind enough to come to the Marine Hospital and see Mr. Gibbs.

The Court: This was after the suit was filed?

Mr. Gergman: Yes. That's all I can show, what's in the record itself.

(Testimony of James C. Gibbs.)

The Court: All right. For that purpose it may be admitted.

The Clerk: Respondent's Exhibit T introduced and filed in evidence.

(The document in the General Accounting Office re Balafer, M.D., was thereupon received in evidence as Respondent's Exhibit T.)

Mr. Bergman: That's all I have, your [36] Honor.

Mr. Ashe: You will strike from that exhibit then that——

The Court: I am only admitting it for the purpose counsel just stated, for the purpose of showing that Dr. Balafer was paid \$20 for some services he rendered when called in by the Marine Hospital for the libelant.

Mr. Ashe: But your Honor has not admitted the document for the \$192.40?

The Court: I said for the purposes counsel stated.

Mr. Ashe: Thank you, your Honor.

Mr. Bergman: That's all the questioning I have, your Honor.

The Court: Do you wish to ask any questions?

Mr. Ashe: I have just a few to clear up a few things on this matter. Does your Honor wish me to proceed or is this your Honor's intermission now?

The Court: We will take a five-minute recess.

(Short recess.)

(Testimony of James C. Gibbs.)

Further Redirect Examination

By Mr. Ashe:

Q. Mr. Gibbs, counsel for the Government asked you concerning government notice of injury in connection with notice in your personal file dated 7-12-48 in which you stated you were bumped on the head in the toolroom window, that you cut your hand, and which report you signed, stating that accident had not been brought about by your own misconduct, and so forth. In connection with that particular incident, [37] did you ever apply for or receive compensation benefits? A. No.

Q. Did you ever receive any money from the United States in connection therewith?

A. No.

Q. Did you make any claim for it? A. No.

Q. Did you lose any time from work?

A. What's that?

Q. Did you lose any time from work in connection with it? A. No.

Q. This was then a formality, this filing?

A. Yes.

Q. Counsel also refers to some letters which are in your handwriting, which are conceded yours, in which you ask for an abstract of your medical record at the Marine Hospital, with particular reference to one dated March 20, 1948. You state: "The copy will be turned over to Mr. Lou Ashe. Mr. Ashe is associated with Mr. Melvin Belli, attorney-at-law," citing the address. "Mr. Belli is my attor-

(Testimony of James C. Gibbs.)

ney in a suit that is the result of the injury I received on November 19, 1946."

Did you ever receive this abstract of your medical record? A. No.

Q. To this day have you ever received one?

A. No. [38]

Q. I show you a copy of letter in Respondent's Exhibit A-1 purporting to be signed by Mr. McCauley of the U. S. Department of Justice, and ask you if you received the original of this, Mr. Gibbs?

A. Yes.

Mr. Ashe: If your Honor please, this letter is dated May 21, 1948.

(Reading):

"We have received your letter requesting authorization for the Marine Hospital to furnish your attorney with an abstract of your medical record. However, as this request was made in a claim you have pending against the United States other than that under the Compensation Act, I am transmitting your letter to the Department of Justice. You will probably hear from them regarding the matter within a short time."

Q. Did you ever apply for or receive compensation in connection with any injury sustained in the course of your employment as a civilian employee of the United States prior to November 19, 1946? A. No.

(Testimony of James C. Gibbs.)

Q. And, I take it then, you never received any compensation for any such injury during that period of time? A. No. [39]

Q. When you returned to the Marine Hospital upon any date after November 19, 1947, or at least after the Federal Tort Claims Act was filed, for what reason did you go there and who asked you to go there?

A. Well, I asked for that abstract of my medical record and they wrote me back the letter that you have there requesting me to go back and be re-examined, and then they made this appointment for this doctor—that I can't recall his name there—but they sent him that \$20 check when they called him in to examine me.

Q. When Dr. Bilafer examined you——

A. Dr. Bilafer.

Q. ——did he treat you in any way?

A. No.

Q. Did you receive any medicine? A. No.

Q. Bandages? A. No.

Q. Were you given a cast—— A. No.

Q. And his examination consisted of what, then?

A. Well, I had to walk—he wanted to see the motion of my foot. And he worked the foot to see what degree of movement was in it. That's all.

Q. He asked you questions about how you [40] felt? A. No.

Q. He asked you whether you had pain in the leg, and the like?

A. Yes, he asked about the foot, but that's all.

(Testimony of James C. Gibbs.)

Q. And he made a record of that? A. Yes.

Q. In your presence? A. No.

Q. You recall when I had you on the stand here the first time that I showed you all the various forms in connection with making application for compensation papers for disability, and you then said that you had not filled out any of those forms. You reaffirm that fact now?

A. That's right.

Q. Now tell me, after your experience of some six years in working for the Government, what is sick leave, in your mind?

A. Well, sick leave is a—as I get it—is a bonus that you are given above your wages to use if it is required. In a case of this kind it was required and I used. That I have been told is part of your wages.

The Court: Why ask the witness this question? That is a matter that is established by rule or regulation, isn't it?

Mr. Ashe: We have been, we have all been inquiring into state of mind on direct, your Honor. I thought we might as well bring out his state of mind, his impression of what he [41] was receiving. It might be that is not the legal import. I thought it might have some bearing with your Honor in this case.

The Court: Well, sick leave is something that all government employees get in most departments of the Government.

(Testimony of James C. Gibbs.)

Mr. Ashe: I would think that to be the general rule, your Honor. I think provision is made for them to be hospitalized when they are injured, if they are injured in the course of their employment, and particularly where there is no wilful misconduct involved.

Q. Mr. Gibbs, prior to the time that you brought suit in this case through my office, did you have a discussion with anyone in authority at the San Francisco Naval Shipyard with particular reference to those who administer the Federal Employees' Compensation Act?

A. Yes. I went up to the dispensary——

Mr. Bergman: Your Honor, I wish the witness be instructed to refrain from pursuing further with the answer until he identifies with a little more particularity the one with whom the conversation was had. "One in authority" is too general.

Q. (By Mr. Ashe): First, with whom did you have a conversation, Mr. Gibbs?

A. Mr. Blakiston?

Q. Blakiston? A. Blakiston. [42]

Q. Where was the conversation had?

A. In the yard dispensary.

Q. When was it had?

A. About two days before I came over to see you.

Q. What was the nature of the conversation?

A. Well, I asked him what rights I had as far as disability was concerned in connection to my job.

(Testimony of James C. Gibbs.)

Mr. Bergman: Your Honor, I feel that what the witness might then have said to this person would not amount to advice to him. It amounts to mere self-serving declaration and, further, it is immaterial.

The Court: I don't see the materiality. It is something that took place almost a year after the injury.

Mr. Ashe: Well, counsel has seen fit to go into letters that he wrote two years after the injury. I will withdraw it. Thank you, your Honor.

Q. Now with reference to your sick leave, that is what you used for your support, is it not, when you came out of the hospital, Mr. Gibbs? You are married, of course? A. Yes.

Q. You testified you have two children.

A. Yes.

Q. You are their sole support?

A. Yes. [43]

Mr. Ashe: I think, your Honor, I have no further questions to ask on this particular point, and could I proceed then with the main case?

The Court: Have you anything further that you want to bring out on the question of election of remedies?

Mr. Bergman: No further evidence on the matter, your Honor. I have one question as a result of counsel's redirect questions propounded to the witness.

The Court: You may ask them.

(Testimony of James C. Gibbs.)

Recross-Examination

By Mr. Bergman:

Q. Counsel has just asked you, Mr. Gibbs, with reference to the time that you went to see Mr. Bilafer. A. The doctor?

Q. Do you recall that testimony just a moment ago? A. Yes.

Q. You didn't tell Dr. Bilafer at that time, did you, that you brought suit against the Government?

A. Yes, I did.

Mr. Ashe: Objected to as incompetent, irrelevant and immaterial, and of no consequence here.

The Court: The witness said that he did.

Mr. Bergman: Withdraw it.

The Court: All right.

Mr. Bergman: That is all.

The Court: Is that all? [44]

Mr. Bergman: Yes, your Honor.

The Court: The evidence is closed on this phase of the matter, is it, gentlemen?

Mr. Bergman: Yes, your Honor, as far as the evidence is concerned.

Mr. Ashe: I believe so.

The Court: All right, now the question of liability, do you wish to proceed on that?

Mr. Ashe: Yes, your Honor, I think we should proceed with that.

Mr. Bergman: Would your Honor be at all interested in hearing from the respondent at this

time with respect to its position on the election? I desire to be heard on the matter.

The Court: Well, I think that I would like to get through this case. This is the second hearing on it and I would like to hear all the evidence and then you can make all the argument you want to when it is all in at one time, rather than taking it up piecemeal. It can't be very extensive.

The evidence as to liability, I suppose you will have some medical testimony?

Mr. Ashe: Yes, your Honor. We did subpoena Dr. Wagner, and he came in here during the recess. He had another subpoena and he had to appear in another federal court at 1:30. He will return after two o'clock. We will call Mr. Gibbs on direct examination as to the liability. [45]

JAMES C. GIBBS

recalled to the stand, previously sworn.

Direct Examination

By Mr. Ashe:

Q. You are Mr. James C. Gibbs and you are the libelant in this case, is that true? A. Yes.

Q. And you live where, sir?

A. Redwood City, California.

Q. You have lived there how long?

A. At this time about five years.

Q. So that you were resident there at the time of the filing of the initial suit under the Federal Tort Claims Act, is that true? A. Yes.

Q. At the time of your injury on November 19,

(Testimony of James C. Gibbs.)

1946, you stated you were an employee of the United States Government? A. Yes.

Q. And in what capacity?

A. As a shipfitter helper.

Mr. Ashe: I think your Honor already has the testimony as to the length of time he served with the United States. We need not go into that phase, your Honor?

The Court: All right.

Q. (By Mr. Ashe): When you were transferred from Mare Island in 1946 to San Francisco Naval Shipyard at Hunters Point, [46] what was your rating and capacity at that time?

A. I was called a snapper there. It's a rate just above a first class shipfitter.

Q. And is the duty of a snapper similar to that of a shipfitter?

A. It's more of a supervisory capacity, a leader.

Q. Is that what the Army would call a pusher?

A. Yes.

Q. In other words, you help to get the work out?

A. Yes.

Q. But still working as a shipfitter?

A. Yes. There was an established rate for that.

Q. Now, sir, will you tell me what your pay was when you first came to San Francisco Naval Shipyard?

A. I can't recall exactly what the rate was. It was around—I believe around then it was around \$11. I can't recall the exact rate of pay.

Q. So there won't be any confusion—I asked

(Testimony of James C. Gibbs.)

your rating at the San Francisco Naval Shipyard when you first came there?

A. I was a shipfitter and helper.

Q. Shipfitter helper? A. Yes.

Q. That was a grade lower than shipfitter?

A. Yes, quite a bit below.

Q. Tell the Court how that came about. [47]

The Court: I suppose you are just trying to establish the question of rate of pay, that's all—aren't you?

Mr. Ashe: That and also to show what his duties were and what he had to do and what he could do after the accident.

The Court: Why don't you bring him up to the time of the accident and ask him what he was doing at that time?

Mr. Ashe: All right. I will have to go into something prior to the accident.

The Court: All right.

Q. (By Mr. Ashe): You recall the U.S.S. Antietam, of course? A. Yes.

Q. When did you first go aboard that vessel?

A. About two weeks before November 19.

Q. And upon whose order did you go there?

A. Mr. Artin.

Q. Do you know the gentleman's full name?

A. Arthur Artin, I believe.

Q. You sure it's Arthur?

A. They call him Art.

Q. And he was your immediate superior, was he?

(Testimony of James C. Gibbs.)

A. Yes.

Q. And what orders were given when you went aboard the *Antietam*?

A. Well, at that time they told me to take the lead on this particular job putting in a bomb stowage. [48]

Q. I'm sorry, Mr. Gibbs, I'm missing that entire answer.

A. I was given an assignment to install a bomb stowage.

The Court: Install what?

The Witness: Bomb stowage.

Q. (By Mr. Ashe): Stowage or storage?

A. Stowage. And told to go down and get it ready to install.

Q. You were to do this work alone or in company of others?

A. In the company of others. I was given a lead on the job and I was given men to help me.

The Court: How many men were under you?

The Witness: I wouldn't say anyone was directly under me.

The Court: You said you were given the lead.

The Witness: Yes, and there was a burner, and a chipper, and another shipfitter with me.

Q. (By Mr. Ashe): Now, sir, was that compartment to which you were ordered when you first went aboard the ship the same one in which you were working at the time of the explosion?

A. No.

(Testimony of James C. Gibbs.)

Q. Will you tell us while you were working in this first compartment—am I right in calling it a compartment? A. Yes.

Q. While you were working in the first compartment, will you tell us whether or not anything of significance took place, whether you had any reason to make complaint about the [49] conditions within it?

A. Yes. We were more or less just kind of told to be careful and we have a void adjacent to this compartment. We didn't know what was in there. So I went up and got this ship's plans and we went through several hatchways and took—unbolted a manhole cover and had the tester there to inspect that, and it was—although it was a void, it was found to be explosive and they had to put in ventilation and pump that explosive material out before we could burn and weld in the compartment that we were working in.

Q. Who requested the gas test? A. I did.

Q. To whom did you direct your request?

A. I can't—

The Court: You said a moment ago that you were told to be careful. What did you mean by that?

The Witness: Well, over there it's up to the—at that time anyway, it was up to you to kind of watch out for yourself if you thought—

The Court: No, that isn't what I asked you. You said, "We were told" or "They told us to be careful." Now, whom were you referring to?

(Testimony of James C. Gibbs.)

The Witness: Mr. Artin. They had the knowledge that the ships were dangerous——

The Court: Mr. Gibbs, I just asked you a very simple [50] question as to who made the statement to you to be careful, not what the general circumstances were.

The Witness: Mr. Artin.

The Court: Who?

The Witness: Artin. A-r-t-i-n.

The Court: Who is he?

The Witness: Leaderman shipfitter.

The Court: All right, go ahead.

Mr. Ashe: Thank you, your Honor.

Q. I think I asked you if you made the complaint regarding the gas and you said yes.

A. Yes.

Q. To whom did you make it? Did you answer that question?

A. No, I can't answer that. I don't recall the gentleman's name.

Q. Can you state as to whether or not a gas tester did come into that area?

A. Yes, he did.

Q. Can you state whether you saw him do anything? A. Yes, I saw him make the test.

Q. And what did it consist of?

A. They have a little box that's the testing equipment and they pump air—take air out of the compartment, and if it is explosive it registers on a needle. I don't know the name of the box. [51]

(Testimony of James C. Gibbs.)

Q. Were you standing there when that test was made? A. Yes.

Q. Did you personally observe it?

A. Yes, I did.

Q. Did you note the results of the test?

A. Yes, it was explosive.

Q. What if anything was done after that test was made?

A. In that particular compartment air lines were installed and the air was pumped out, and about two or three days later it was declared safe in that particular area.

Q. Did you continue to work in that area?

A. Yes.

Q. After the gas test?

A. Not until it was O.K.'d.

Q. How long did you work in this first area before you went into the second area?

A. About ten days.

Q. Can you describe this area to the Court so that we can get a picture of it, where it was on board the Antietam? A. Yes, I believe so.

Q. Now talk slowly and see if you can't tell us or describe it for us. Will it help you to use the blackboard?

A. Yes, it would. It's kind of hard to describe a ship's compartment.

Mr. Ashe: Does the Government have any plans or pictures [52] of these compartments?

Mr. Bergman: I have a plan of the ship.

(Testimony of James C. Gibbs.)

Mr. Ashe: Would that be of some help to us and the Court?

The Witness: That would be.

Mr. Bergman: If he can use it. I can get it for you.

Mr. Ashe: I will go on to something else.

The Court: Well, the aircraft carrier is divided into compartments, is that right?

The Witness: Yes.

The Court: You were working in one compartment?

The Witness: Yes.

The Court: Now, what was the general location of this compartment that you worked in for about ten days, where on ship was it located?

The Witness: It was about midships between 150 approximately.

Q. And what was the approximate size of the compartment?

A. Oh, about 20 by 20 feet. It was irregular-shaped compartment.

Q. 20 by what?

A. About 20 by 20. It was an irregular-shaped compartment.

The Court: What had that compartment been used for, if you know? What was it?

The Witness: I don't—it had been used for some type of ammunition storage. [53]

The Court: In other words, it was a storage compartment for some kind of ammunition?

The Witness: Yes.

(Testimony of James C. Gibbs.)

The Court: And did you work in there, on a scaffolding or what?

The Witness: No, we were in there at that particular time to tear out the existing material in preparation to install this new type of stowage.

The Court: What did you stand on, the floor, when you were working there?

The Witness: Both, we stood on the floor and we had scaffolding to reach up.

The Court: So there was some scaffolding?

The Witness: Yes.

The Court: So the job was to clear out this former ammunition storage compartment?

The Witness: Yes.

The Court: And it was located about midship, you say?

The Witness: Yes.

Q. (By Mr. Ashe): You refer to the number as a frame number. If the Court is not aware—perhaps your Honor is better than I. Make that clear.

A. Well, the ship is laid out with frames—I imagine you have seen a little boat or skiff; they have ribs in them. The same thing is relative to a ship. Those ribs are [54] numbered, and this was in the vicinity of frame 50.

Q. Generally amidships? A. Yes.

Q. Prior to the time that you asked for this gas test, did anything else significant happen in the area other than that which you have described in

(Testimony of James C. Gibbs.)

connection with any of the other employees on duty there with you? A. No, nothing in particular.

Q. Did you have occasion at all to remove a man-hole cover in that compartment?

A. Not in that compartment. We had finished cleaning this job out and while we were standing there we were told to go into another compartment and remove a manhole cover, three of us, and while we were removing that one of the fellows, as soon as he loosened the manhole cover, the gas started escaping, and that was about two days before this explosion. Well, we went back up and——

The Court: This was in another compartment?

The Witness: Yes. Yes, after the one we were working in.

Q. (By Mr. Ashe): Every once in a while—I regret to say this—your voice gets lost and I don't hear you. A. I am trying to talk up.

Q. Open your mouth and talk slowly, will you, please? Now, where was this area located, where you had occasion to work on this manhole [55] cover?

A. Oh, it was aft and about two decks below where we were working.

Q. What deck were you working on?

A. Five.

Q. This was two decks below it? A. Yes.

Q. Is it proper to say it is called seven?

A. Well, it would be the seventh deck or the skin of the ship, either one.

Q. In the area where you were working, where

(Testimony of James C. Gibbs.)

you removed the manhole cover with some of your other co-workers, are you personally acquainted with the nature of the things which were there? What was there in that area?

A. At that time I wasn't acquainted with it. I have learned since that——

The Court: Don't tell us that.

Q. (By Mr. Ashe): If you say you don't know, that's it.

The Court: After you finished this work in the one compartment then you were sent to work in another compartment; is that what happened?

The Witness: No, this is—we had just gone and released a manhole cover preparatory to a gas test.

The Court: I see. In another area.

The Witness: Yes.

The Court: That was another compartment? [56]

The Witness: Yes.

Q. (By Mr. Ashe): In connection with your work at—we will call it compartment two, the second one—was anybody hurt or injured at that time?

A. No. One of the fellows got pretty sick from the gas coming out of that manhole. That's about all.

Q. Do you remember who that was?

A. Ellis Bohn.

Q. When did you first have occasion to be assigned to the compartment where you were injured?

A. On the day of the explosion.

Q. And that was November 19, 1946, at about what hour?

A. About 8:30 a.m.

(Testimony of James C. Gibbs.)

Q. Was Mr. Artin still your leaderman at that time? A. Yes.

Q. Will you state the fact as to whether he ordered you in there or not?

A. Yes, he did order us in there.

Q. What time do you normally go on duty?

A. Eight o'clock.

Q. Between eight and eight-thirty what happened that morning?

A. We went down and stood by our regular job. We were waiting for material to start that.

Q. What were Mr. Artin's instructions to you, if any he gave?

A. To go into compartment 501M; report to Mr. Lamb that had [57] the lead on that job, and to do as he said.

Q. Is it fair to state in the custom of your work that one day one man has the lead and some other time a man may have it for a particular job?

A. Yes. But generally one man is left on the lead of a job until it is completed.

Q. I see, sir. A. Yes.

The Court: May I interrupt you in sequence here?

Mr. Ashe: Of course, your Honor.

The Court: This is not a compartment—This compartment that you reported to this day, was that the compartment which you referred to wherein the manhole cover was opened?

The Witness: No.

The Court: That is some place else on the ship?

(Testimony of James C. Gibbs.)

A. Yes.

Mr. Ashe: I was about to establish that. Thank you, your Honor, very much.

Q. Now, this compartment to which you reported was located on what deck?

A. The fifth deck.

Q. And it was a place in which you had not worked previously up to this day? A. Yes.

Q. And your first acquaintanceship with it was when you went [58] on the job; is that right?

A. Yes.

Q. Did you observe this compartment when you entered it—yes or no—did you observe the compartment? A. Yes.

Q. Will you be kind enough to describe to the Court its dimensions, height, quality of its outline, and so forth?

A. Well, it's a little—an irregular-shaped compartment, approximately 50 feet wide, 25 feet long. But the irregularity comes from the elevator recess and a trunk recess.

The Court: Was this also an ammunition storage compartment?

A. Yes.

Q. (By Mr. Ashe): Would you be kind enough, Mr. Gibbs, to give us a little freehand sketch—with your Honor's permission—to give us a little freehand sketch of this particular compartment of which you now speak?

(Witness goes to blackboard.)

(Testimony of James C. Gibbs.)

Make it as broad as possible. Then you can put your dimensions in.

A. (Indicating sketch drawn on blackboard): This would be compartment 501-M. This is the elevator, this would be a ladder, and a ladder here.

Q. (By Mr. Ashe): Would you be kind enough to indicate where the starboard and port sides appear? [59]

A. This would be forward, port, starboard, aft (indicating).

Q. How did you enter that compartment?

A. Through a trunk lead—on this ladder.

Q. What do you mean through a trunk?

A. Well, the ladder is encased, is divided off, and they call that a trunk. It is partitioned off, with the ladder going inside. The ladder is along here, like this. I am trying to draw a view of the compartment just as you look at the floor here.

Q. When you went into the compartment were you alone or accompanied by others?

A. I was accompanied by others.

Q. To the best of your present knowledge, state to the Court all the persons, by name, that you recall there with you.

A. Mr. Lamb, Mr. Bohn.

Q. Who else?

A. That's about all the names that I know of the other men that were there.

Q. Can you describe the other men by their occupations on that particular job who were there?

(Testimony of James C. Gibbs.)

A. Yes. There was about two welders, two chip-pers, three shipfitters, and two fire watchers.

Q. These fire watchers, were those gentlemen, to your knowledge, civilian or naval personnel?

A. They were naval personnel. [60]

Q. And do you have any personal knowledge as to why they were there?

A. Yes. To watch for fire while the welders were welding and the burners were burning and that sort of thing.

Q. The fire watchers who were on duty at the time this explosion finally happened, were those the same men who were on duty when you entered the compartment?

A. No, I believe they changed watchers about—oh, it must have been ten o'clock, or something like that. I don't recall the exact time they changed watches, but they did change while we were there.

Q. Was that somewhat prior to the explosion itself? A. Yes.

Q. Now, Mr. Gibbs, inviting your attention to the floor or deck of this compartment, of what was that made? A. Steel.

Q. What type of steel?

A. They call it malleable steel.

Q. How thick is it?

A. Oh, approximately—either a quarter inch or three-eighths of an inch—I don't recall exactly which.

Q. When you came into the compartment was

(Testimony of James C. Gibbs.)

there anything in language on the walls, on the floor, or anywhere else on the compartment?

A. Approximately in this area, here, there was a line on [61] the deck, like that, and they had written in it "No welding or burning in this area."

Q. Would you be kind enough now to permit me to erase what you have and show where the writing was? A. It was in this area, here.

Q. And it said, "No burning or welding"?

A. "Or chipping."

Q. "Or chipping."

A. Inside this area (indicating).

Q. I think we know what burning is, and welding. What is chipping?

A. Well, chipping is like they have pneumatic air guns to chip off steel. That's to clean up any residue from burning. Principally that's the reason they were in there.

Q. Now, sir, will you give us the dimensions of this area and put them right on the board, the outer area first?

A. This is a wild guess, but I would say about 50.

Q. Feet or inches?

A. About 50 feet by possible 25 feet. Now, that could be very wild. I don't know exactly how wide exactly.

Mr. Ashe: Would counsel for the government be kind enough to bring those plans in this afternoon? Perhaps we could——

(Testimony of James C. Gibbs.)

Mr. Bergman: I am quite sure I have them. If I do, I will. [62]

Mr. Ashe: Thank you sir.

Q. Did Mr. Artin make any comment or did he not make any comment with reference to the inscription on the floor regarding the admonition not to burn, weld or chip?

A. Mr. Artin did not.

Q. Did anyone else call your attention to it in that area?

A. Mr. Lamb pointed the area out to us and told us not to burn and weld inside the chalk lines.

Q. Did he also state why?

A. Yes. It was an unsafe condition, there was gas, and they didn't know exactly where it was coming from aboard the ship and they knew there was some kind of a storage tank directly underneath this deck.

Q. That would be the deck below deck five?

A. Yes.

Q. Now, sir, where did you first go to work in this compartment?

A. Well, we started over here on the port side laying down, you might call it, battens or boards for the lower side of the ammunition—rocket—this was a rocket stowage in this particular area.

Q. How long did you work in your position as described on the port side?

A. Well, from about 8:30 until the time of the explosion I was working between here. We had a blueprint tacked up on [63] this aft bulkhead and

(Testimony of James C. Gibbs.)

we were working from that blueprint to get the location of——

The Court: He asked you how long you were working there.

The Witness: That would be about two hours.

Mr. Ashe: Until the time of the explosion?

A. Yes.

Q. Would you be kind enough just to clarify this, to give us the dimensions of the area which had been marked off with the admonition?

A. That would have to be very approximate, because I could be way off on that, but I would say about, possibly half of the compartment—oh, let's say about 25 by 12, or something like that—15—make it 12 and a half. I'll just guess—Take half of it.

Q. But, at any rate, it was generally in the center of the area? A. Yes.

Q. At any time during the first few hours prior to the accident that you worked over here and occasionally consulting the blueprints tacked up, did anything of significance take place that was extraordinary? A. No, I wouldn't say so.

Q. It is fair to state then that you and the other gentlemen continued with your work without anything happening? A. Yes. [64]

Q. What is your recollection as to the time of this explosion?

A. Well, I thought it was about eleven o'clock

(Testimony of James C. Gibbs.)

in the morning, but I have learned since the correct time.

Q. I make reference to a copy of what purports to be the ship's log—and I first present it to counsel and ask him if that is a copy. That was handed to me by someone in your office.

The Court: What sort of lighting did you have to work by in there?

A. There was electric lights.

The Court: Electric lights?

A. Yes.

The Court: How many men were working in there altogether at the time of the explosion?

A. I would say approximately 10 or 12.

The Court: Were you all working in the same part.

A. In the same compartment. There were some working over here, some working over here, and some working over here.

The Court: All right. What do you want to do, establish the time?

Mr. Ashe: Yes, your Honor.

The Court: Can't you agree on that, what was the time of the explosion?

Mr. Bergman: I am willing to. I can't offhand remember [65] exactly the time.

Mr. Ashe: If I may refer to the log, your Honor——

The Court: The witness says about eleven o'clock.

Mr. Ashe: The log, if your Honor please, says

(Testimony of James C. Gibbs.)

10:27 explosion occurred in coffer dam surrounding gasoline tank C-14, frame 155 port side. Just so much of that, for the moment, to establish the time.

Q. If the log says 10:27 a.m. is the time of the explosion, is that reasonable?

A. Yes. I didn't know the exact time.

Q. One more dimension, Mr. Gibbs. If we were looking up to what the layman calls the ceiling, how many feet would we have from where you were working and the ceiling?

A. I probably have to guess—about eight or nine feet.

Q. Is that a fairly good estimate?

A. I would think so. It could be ten—between eight and ten feet.

Q. At least you could work in comfort there—you didn't have to bend over; the ceiling wasn't on top of you?

A. That's true.

Q. What is the nature of the material of which this upper deck is made?

A. Well, it's constructed of steel beams with the plate laid on top.

Q. At ten o'clock that morning you were still well, were [66] you, and walking around doing your work?

A. Yes.

Q. Assuming the accident to be at 10:27, will you state to the Court precisely what you did the minute or two before that hour?

A. Well, my partner had left to get some safety equipment. I had walked from here, over to this blueprint. I was standing approximately here, and

(Testimony of James C. Gibbs.)

I was getting the location of a different type of batten to put on.

Q. You had changed the nature of the work, then, is that correct?

A. They are all different, different lengths and heights and that sort of thing.

Q. All right. Now speak very slowly and tell the Judge exactly what took place at that time.

A. Well, I left here——

Q. You have told us you were at the blueprint.

A. Oh, yes. I didn't know really what happened. I just felt a heavy wind. That's all I knew. The next thing I knew I was on my hands and knees. I didn't know exactly what had happened. The lights were all out and I looked over here and this was on fire, at this area (indicating).

Q. May I stop you there just for a moment. Just before you felt this wind that you speak of, had you in your hand any explosive materials? [67]

A. No.

Q. Did you have a torch of any kind in your hand? A. No.

Q. Did you handle a torch at any time during this explosion? A. No.

Q. Did you have anything in your hand of what you would call an explosive nature?

A. Not unless it would be a hammer which could make a spark.

Q. There were other men there with hammers, were there? A. Yes.

(Testimony of James C. Gibbs.)

Q. At that moment you were just reading a blueprint?
A. Yes.

Mr. Bergman: I object, not particularly to the last question propounded, but to the series of questions which are obviously leading. I have not objected heretofore because I didn't want—I wanted to expedite the matter and hurry it along, but this is one series of questions, one after another, and the only obvious answer to which is "Yes."

The Court: If we let the witness tell the story it would take too long, and it is better that counsel, who is familiar with the case, interrogate him. He had got to the point after he fell down on his knees he turned around and he looked and he saw the area around——

The Witness: This ladder (indicating).

The Court: ——the area around the ladder on the port side [68] in flames.

The Witness: Yes.

Q. (By Mr. Ashe): Was there or was there not a clear vision to that point?
A. No.

Q. Why not?

A. Well, it was smoky, and well, quite a bit of smoke.

The Court: You said the lights went out.

The Witness: Yes. There was no light.

Q. (By Mr. Ashe): You could see the flame through the smoke, could you?
A. Yes.

Q. Now I want you to stay with me for just a moment. Right after the explosion, this big wind that you felt, what happened to you?

(Testimony of James C. Gibbs.)

A. I don't know. The next thing I know I was trying to get up off the floor.

Q. Did you feel any pain at that time?

A. No.

Q. Did you have any consciousness of having been hurt at that time? A. No.

Q. Were you standing up?

A. No, I was on my hands and knees. I tried to get up and walk. I heard some fellow screaming over here that he was [69] burning up, and I went over to—tried to go and help him.

Q. State the facts as to whether the smoke affected you or did not affect you.

A. Well, it did. I got up and tried to go over here twice and this—then I started—I fell down. I still didn't realize I was hurt, and then I fell down. So then I started to have a hard time getting air, so I left to go out somewhere in here—I don't know where, but anyway I crawled over here and up this hatch, up that ladder.

Q. Do you have any present recollection as to whether the steel deck that you described, which was underneath you, had remained as it was before the accident or whether some change took place?

A. At the time I didn't know. Afterwards they told me.

The Court: Don't say that.

Mr. Ashe: Don't do that, Mr. Gibbs, please.

Q. How did you get to that ladder? Did you walk to it? A. No, I crawled.

Q. How did you crawl?

(Testimony of James C. Gibbs.)

A. On my hands and knees.

Q. When you got to the ladder were you conscious of any pain?

A. No. No, I didn't hurt at all; I just couldn't stand up. But it was hard to breathe, that's all.

Q. Tell us what you did when you got to the ladder. [70]

A. I crawled on my hands and knees up the ladder and on to the deck, and as I started to the galley deck there was a fellow coming down and he asked me if I could make it all right and I told him yes, there was some other guys in there and to go ahead and go after them. So that's where he left me.

Q. How many decks did you have to go up to get to the place where you got air again?

A. Well, that would be about four decks.

Q. And how did you manage that?

A. How did I manage to get up?

Q. How did you get up there?

A. Up this ladder. There is a ladder that runs straight up and down from the fifth deck to the fourth or galley deck—up to it—that would be the second deck the galley is on.

Q. Upon which deck did you finally come out?

A. Well, I came out on the main deck.

Q. I see. What if anything was done at that time for you at that point?

A. Well, they picked me up and took me down to the ship's dispensary.

Q. That was located where?

(Testimony of James C. Gibbs.)

A. Well, let's see. That was down one deck below the main deck and it's on the starboard side of the ship a little bit aft. I imagine that was the outline of the ship.

Q. Did you walk to that place? [71]

A. No, they carried me over there. I couldn't walk.

Q. When did you first realize there was some difficulty about your leg?

A. Well, when I was down here (indicating)—when I fell down I realized that something was wrong with it, but I didn't know what. I didn't know what. I didn't have any idea what was the matter with it. I knew it was hurt.

Q. Have you any present knowledge how long you remained in that compartment after the big wind or explosion?

A. No, I don't know.

Q. The time element is of no significance to you at this time?

A. No.

Q. When you were taken to the ship's dispensary, what if anything was done for you there?

A. Nothing. They brought up fellows that were hurt a lot worse than I and they worked on them for—I just stood by or laid by, rather, until they took me to the yard dispensary.

Q. How did you get to the yard dispensary?

A. Well, I was carried off the ship and put in an ambulance and taken over.

Q. And at that point were they able to help you? Were they sufficiently free to do something for you then?

(Testimony of James C. Gibbs.)

A. No, they were pretty crowded. We had to sit around in the dispensary over there and they—I got sick about that [72] time.

Q. What do you mean, you got sick?

A. Well, I don't know, the shock kind of wore off and I began to hurt. I got sick to my stomach. I felt sick to my stomach. I didn't vomit or anything but one of the fellows came around and gave us a shot of morphine about that time, sedatives.

Q. Tell me, sir, did you strike your head in this accident?

A. Well, I must have. I either struck it or something struck me. They took me from the yard dispensary to the emergency dispensary and that's the first thing they examined me for, was a brain concussion.

Q. Did you have anything on your head which indicated you had been hit in the head?

A. Yes, sir, I had a pretty big bump here (indicating).

Q. Did it pain you at that particular time in the yard dispensary?

A. Well, that is when I first started feeling pain, at the yard dispensary, yes.

Q. Where did you feel this pain?

A. Well, my foot and my head and my back, my fingers were cut and legs were; I was just banged up generally, that's all.

Q. Did you at that time have blood or cuts about your body or your hand?

A. Yes, my shins were skinned and my foot

(Testimony of James C. Gibbs.)

started to turn [73] blue about that time and I knew it was broken then. I was burned across the back.

Q. Any of your hair burned in this explosion?

A. Very little. I took most of the burn across the back. I missed most of the fire.

Q. Thank God for that. How long were you at the yard dispensary?

A. I imagine we were there about an hour.

Q. And you were given morphine, you told us.

A. At the yard dispensary.

Q. Did that help your pain in any way?

A. Yes, it helped. Then the shock wore off and I kept getting, you know—it hurt pretty bad but that morphine helped quite a bit.

Q. All right, sir. Now tell us your progress from the yard dispensary; to what point were you taken from there?

A. We were taken to the emergency hospital on Potrero Avenue in San Francisco.

Q. At the emergency hospital were you attended by any physicians there?

A. There was a physician there. He examined me. He thought I had a brain concussion and then they X-rayed my foot and they couldn't find anything, but then they X-rayed it the second time and they found that I had a broken heel.

A. And that was the first time there had been opportunity [74] for anyone to X-ray your leg, is that right?

A. Yes.

(Testimony of James C. Gibbs.)

Q. Having discovered that, what if anything was done for you at that point?

A. Well, about that time some naval officer came in and had us removed to the Marine Hospital.

Q. In what manner, please?

A. By ambulance.

Q. You at no time had done any walking since you came up the ladder? A. No.

Q. Will you tell me whether the pain continued in any part of your body on the way to the Marine Hospital?

A. Well, that pain was—I couldn't get rid of it for ten or twelve days. It was just there. That's all. I couldn't get away from it.

Q. All right. Now, when you got to the Marine Hospital——

The Court: Why don't you have him take the stand?

Mr. Ashe: I'm sorry.

(Witness returns to stand from blackboard.)

Q. (By Mr. Ashe): When you got to the Marine Hospital I assume that you were placed in a bed and began to receive attention, is that correct?

A. Yes.

Q. Up to that time nobody asked you to sign any papers or [75] do anything about your accident? A. No.

Q. Who was your attending physician, Dr. Wagner? A. Dr. Wagner, yes.

Q. And he continued as your physician all the time that you were in the hospital? A. Yes.

(Testimony of James C. Gibbs.)

Q. With relation to your pain while in the hospital did you make any complaint of it?

A. Yes.

Q. To whom?

A. To the nurses and Dr. Wagner.

Q. What if anything was done for you?

A. They gave me tablets. I believe they said they were codeine.

Q. When, if at all, were you casted at the Marine Hospital?

A. I think it was about three days after I got in there. Approximately.

Q. Did that help to relieve some of the situation? A. No, not at first, it didn't.

Q. At any time while you were in the Marine Hospital were you able to walk on your own power?

A. No.

Q. How long were you there in all?

A. Fourteen days. [76]

Q. What if any discussions were had relative to your staying in the hospital or leaving the same—and with whom, first? First, did you have a discussion with anybody? A. About what?

Q. About staying at the hospital or going home.

A. Well, I believe about the thirteenth day I was able to sit up and I asked to go home, and they told me I wouldn't be able to go home for about three months. But the next day I practically insisted on going home, so they said if I could make it, it would be all right.

Q. This discussion was had with whom?

(Testimony of James C. Gibbs.)

A. Dr. Wagner.

Q. Did you on the fourteenth day become discharged from the Marine Hospital in San Francisco?

A. Yes.

Q. And at that time you left with your cast on?

A. Yes.

Q. And how high a cast did you wear, sir?

A. Well, almost to my hip.

Q. During the time that you were in the hospital will you state the fact as to whether or not your sleep was or was not disturbed.

A. Well, for about ten or eleven days I couldn't do much except all I would do is doze off and I would try—I would wake up trying to get away from that pain in my foot and that [77] was the main trouble.

Q. They were attempting to assist you, were they, in getting rid of that pain?

A. Yes.

Q. In what way?

A. At night time they would give me codeine and that—whatever else there was.

Mr. Ashe: I would state to Your Honor that eventually I shall read the medical records which would indicate that all the time that he was there it was necessary to administer various sedatives such as morphine, nembutal.

The Court: Suppose you just state it. There is no objection, is there?

Mr. Bergman: So long as the record shows.

Mr. Ashe: That there was morphine, nembutal, codeine, and in various grains given to him, mor-

(Testimony of James C. Gibbs.)

phine sulfate, all the same, being sedatives, given for pain, practically up to the very day of his discharge or within a day thereof.

Q. When you left the hospital you left on crutches, I take it? A. Yes.

Q. You went where, to your home?

A. Yes.

Q. Who cared for you there?

A. My wife. [78]

Q. She does not work? A. No.

Q. She took care of you? A. Yes.

Q. When you were discharged you received orders to return for out-patient treatment?

A. Yes.

Q. When were you told to come back?

A. I think I had to go back every week for about two or three weeks. I can't remember that exactly.

The Court: You did go back every week or so?

The Witness: Yes.

Mr. Ashe: And that continued as an out-patient for how long?

A. About six or eight months. I can't recall exactly how long.

Q. Then, I take it, your out-patient treatment continued even after you returned to work?

A. Yes.

Q. Can you tell us when you did return to work?

A. About three months and a half after November 19th.

(Testimony of James C. Gibbs.)

Q. How long were you required to use your crutches?

A. About four months, four months and a half, I guess.

Q. When you disposed of your crutches were you still wearing a cast? [79]

A. No, they had taken off the one up so high (indicating) and put on short cast, just below my knee, and I was told to practice walking on that with the crutches.

Q. Is that what is known as a walking cast?

A. Yes.

Q. Did you continue to wear that cast?

A. For about six weeks, yes.

Q. Speaking of the large cast and the small cast, how many months in all were you casted?

A. Three months and a half.

Q. And you wore crutches for about four and a half months, you say?

A. I would say about that, yes, sir.

Q. Having discarded your crutches were you able to walk without any assistance or did you require some other support?

A. No, I had to use the crutches right after I got the final cast off even, and then I had to have a cane for quite some time after that.

(Whereupon a recess was taken until 2:30 p.m.) [80]

(Testimony of James C. Gibbs.)

January 5, 1951 at 2:30 P.M.

Mr. Ashe: If the Court please, prior to the recess I requested and Mr. Bergman very kindly brought to us a blueprint of the particular compartment which Mr. Gibbs has been describing on the blackboard. I would like permission to send it up to Your Honor presently, but referring to C—501-M, it might help a little as we go along, and may I offer this for identification, with Your Honor's permission.

The Clerk: Libelant's Exhibit 6 marked for identification.

Mr. Bergman: Please read into the record, for my benefit, the identifying marks on the lower right hand corner.

Mr. Ashe: Yes, I would be very happy to. The blueprint is identified as "1st platform." The scale is given $1/16"=1'0"$. It says it is a blueprint of Bureau of Ships No. CV 36.S0103-497100 CV36-Plate 14 of 18.

It has been brought to my attention also, may it please the Court, that the medical records to which I referred have only been put in for identification, and may I now move their admission in evidence.

The Court: Which records?

Mr. Ashe: These, sir, are the medical records from the U. S. Marine Hospital. They are Register No. 109778.

The Court: I mean the clerk's number. The clerk has [81] given them a number.

(Testimony of James C. Gibbs.)

Mr. Ashe: Libelant's 5 for identification.

The Court: Libelant's 5?

The Clerk: Libelant's 5 for identification, yes,
Your Honor.

The Court: All right, mark it in evidence.

(Medical records, U. S. Marine Hosiptal,
Register No. 109778 was received in evidence
as Libelant's Exhibit No. 5.)

Mr. Ashe: If that is similarly true of the X-rays
which came from the hospital, unless those are in
evidence, may I suggest those go in, too, your Honor?

The Court: All right.

The Clerk: Libelant's No. 7 introduced and filed
in evidence.

(X-rays referred to were received in evidence
and marked Libelant's Exhibit No. 7.)

The Court: Which is the compartment?

Mr. Ashe: 501-M.

The Court: Did Mr. Gibbs help you?

The Witness: May I show you? (Demonstrating
on blueprint.)

The Court: I see.

Q. (By Mr. Ashe): Before the recess, Mr.
Gibbs, I believe you told us you had gone home on
crutches and that you thereafter got rid of those
and finally had a cane. How long did you use the
cane, please? [82] A. About three months.

Q. And when you returned to work on crutches,
will you kindly state the nature of the employment
you undertook?

(Testimony of James C. Gibbs.)

A. I was given a job in the shop plan office.

Q. What did your duties consist of, please?

A. Routing of jobs with the blueprints to the men in the shop.

Q. Was that job done in a standing position or a sitting position? A. Sitting.

Q. How long did you continue on that particular job, and in that manner?

A. About a year.

Q. Were you required in connection with this planning job to do any walking, lifting, or any heavy work? A. No.

Q. Was that by arrangement with your superiors? A. Yes.

Q. A year after you occupied the position as a planner, were you given another type of job?

A. Yes.

Q. While you were a planner were you coming to work on your crutches?

A. Part of the time. At the first part, yes.

Q. And in the cast? [83] A. Yes.

Q. And thereafter with a cane? A. Yes.

Q. What was the next job you got after the planning job?

A. They built a new shipfitter shop and I was assigned to move the toolroom, get all the equipment moved to the new shop and set it up in operation.

Q. This second job required you to do what, sir?

A. Well, merely as an acting supervisor to see

(Testimony of James C. Gibbs.)

that the thing was accomplished. I didn't do any work.

Q. And how long did that job continue?

A. That job continued approximately a year. I can't recall exactly the date of it, but it was approximately a year.

Q. Is it fair then to state that for practically two years after you returned to work about March '47 that you had jobs that did not call for you to do much heavy work or walking?

Mr. Bergman: Object to that as the conclusion and statement of counsel rather than of the witness.

The Court: Well, he practically stated that already. I remember you said, though, that your wages were somewhat larger than they were before.

The Witness: No, sir, they were the same.

The Court: Were they exactly the same?

The Witness: Yes.

The Court: Some other witness testified. [84]

Mr. Ashe: Your Honor is right in this regard—just before you got into this explosion did you get a reclassification?

A. Yes.

Q. State to His Honor what happened as a result of the reclassification.

A. Well, the date that I came home from the hospital, this Mr. Ray came out—

The Court: This takes so long. Just state what it is.

Q. (By Mr. Ashe): What is it, that's all.

(Testimony of James C. Gibbs.)

A. I was reclassified to first class shipfitter.

The Court: I think the wages were a little more than you were previously getting, were they not, as a result of that reclassification?

The Witness: Yes.

The Court: During this period that you worked after you returned from the hospital, I think you said that.

Q. (By Mr. Ashe): I take that to be the fact, isn't it? A. Yes.

Q. After you spent two years at these jobs, describe what you did then.

A. I worked between the plan office and the mold loft.

Q. What? A. The mold loft.

Q. What did you have to do in connection with that job? [85]

A. The mold loft is a layout of various ship parts, patterns. Then we send the patterns to the shop to be fabricated from steel.

Q. Did you eventually return to your classification as a shipfitter?

A. Not before I got laid off. After I returned the second time I did, yes.

Q. When were you laid off?

A. About September, I believe, 19th.

The Court: This year?

The Witness: 1949.

Q. (By Mr. Ashe): Did you attempt to seek employment elsewhere after September?

The Court: I thought when this case came up in

(Testimony of James C. Gibbs.)

June of last year you were still working for the Government.

The Witness: No, I was not working.

The Court: You were not. All right.

Q. (By Mr. Ashe): Had you attempted to seek employment after September, 1949? A. Yes.

Q. In what field?

A. I tried to go carpentering.

Q. Are you a member of the carpenters' union?

A. Yes.

Q. Do you hold a card in that union? [86]

A. Yes, sir.

Q. Did you get a job as a carpenter?

A. Yes, sir.

Q. What did you earn as a carpenter?

A. That was seventeen-eighty and nineteen dollars a day.

Q. What do you mean by that?

A. Well, we were paid on a daily rate, by the day.

Q. I don't know what seventeen eighty and nineteen dollars means.

A. When I first went carpentering the scale was \$17.80 a day. After I was there a while it was raised to nineteen.

Q. Did you hold that job down for any length of time?

A. Approximately three or four months.

Q. Were you fired or were you laid off or did you quit or what happened?

A. No, I got a call back to the Navy Yard and

(Testimony of James C. Gibbs.)

I was having quite a bit of trouble holding the job. I couldn't do roof work and that. So I went back to the Navy Yard.

Q. As a carpenter in that particular classification what were you required to do physically to discharge your duties?

A. Well, we were required to fabricate parts of buildings and put on roofs and general carpenter work.

Q. Did it require you to use anything like ladders?

A. Yes.

Q. Did you have to climb? [87]

A. Yes.

Q. Up and downstairs, and so forth?

A. Yes.

Q. Were you able to do so?

A. No, not too well. That's the reason I came back to the yard.

Q. When did you return to the yard?

The Court: Why? What happened? What was the matter with your foot that made it tough for you?

The Witness: Your Honor, I am not sure on it, and when I get up high I am not sure of my foot and I——

The Court: Does it give you pain?

The Witness: Yes.

Q. (By Mr. Ashe): What if anything in connection with the foot was it that made work difficult for you?

A. Well, I am not sure of it. When I stand on

(Testimony of James C. Gibbs.)

it, particularly when I try to climb, I am not sure I am going to stay up.

Q. When did you return to the yard, sir?

A. That was about last June.

Q. 1950? A. Yes.

Q. Have you continued at the yard since that time? A. Yes.

The Court: You said "yard." Navy yard? [88]

Mr. Ashe: San Francisco Naval Shipyard. I should have been clear, Your Honor.

The Court: That's all right.

Q. (By Mr. Ashe): And you are still there at this time? A. Yes.

Q. And in what capacity presently?

A. Shipfitter.

Q. As a shipfitter what are you doing?

A. At the present I am working inside Shop 11.

Q. In connection with your work is there much walking to do presently? A. Yes.

Q. How are you getting along now?

A. Pretty well. I have quite a bit of pain with the thing in the afternoons. I have to go and sit down once in a while, but it gives me trouble particularly in the afternoons after I am on it all morning.

Q. When do you notice it the most?

A. Well, after I do a lot of walking.

Q. You have been back to the hospital on various occasions as described by my colleague here?

A. Yes.

(Testimony of James C. Gibbs.)

Q. For examinations in connection with your basic injury? A. Yes.

Q. But never in connection with any other injuries since [89] this accident? A. No.

Q. You haven't hurt that foot in any way since this accident? A. No, other than——

Q. I mean, you have no second injury——

A. No.

Q. ——to it? A. No.

Q. Were you acquainted at the time you were at the San Francisco Naval Shipyard, and with particular reference to the Antietam, with what the schedule was for the work to be done on that vessel? Just answer yes or no first. A. Yes.

The Court: What did you mean by schedule of work?

Mr. Ashe: So much work has to be done in so many days on a particular project, as I understand it.

The Court: What is the materiality of that?

Mr. Ashe: I have a point, Your Honor.

The Court: Speak up. Say what it is.

Mr. Ashe: I will tell you what it is. I make an offer of proof that Mr. Artin and others told him this was a rush job, it was a hot job, and hurry up and get it done.

The Court: What would be the materiality of that?

Mr. Ashe: My purpose is to show proper safeguards and [90] precautions were not taken, and I think——

(Testimony of James C. Gibbs.)

The Court: That wouldn't necessarily follow. That is a rather hackneyed sort of a claim in cases, that it is a hurry-up job. There is no connection between the fact it is a hurry-up job and whether precautions are taken. Precautions should have been taken whether or not it is a hurry-up job or a slow job. I don't see the connection there. That kind of argument goes before juries sometimes.

Mr. Ashe: I assure you, I don't mean to impose upon Your Honor, and I don't intend to do it.

The Court: It is immaterial. If the Government had a duty here and did not perform it and they were negligent, it doesn't make any difference whether it is a hurry-up job or not.

Mr. Ashe: I see Your Honor's point and I thank you, sir.

Q. Now in connection with your previous injury, will you please state to the Court all the things that presently bother you which you claim are the result of this injury, in detail, please.

A. The foot is very sore. It is right now. I haven't been free of pain from the thing from the time it happened.

The Court: Is the pain in the heel itself?

The Witness: Yes. It is in the foot, Your Honor, and these joints are partially fused together (indicating).

The Court: Where did the bone break?

The Witness: Across here, the heelbone. [91]

The Court: Right across the heelbone?

The Witness: Yes. And the doctor tells me that

(Testimony of James C. Gibbs.)

has affected the cords that are attached to the heel-bone, and the joints—as a result of healing has deposited calcium in the joints, and that is where I get the pain. So he tells me.

The Court: And you still have pain?

The Witness: Yes.

The Court: Does it hurt you continually or can you walk for a reasonable period of time and then feel pain?

The Witness: It hurts—I am conscious of it all the time, but the more I walk the more severe it gets.

Q. (By Mr. Ashe): Would you be kind enough, if His Honor has not noticed it previously, to walk back and forth in this area, please?

The Court: I have observed the plaintiff.

Mr. Ashe: Very well, Your Honor.

Q. The amount of money you would have gotten as a carpenter, I take it, is greater than that which you are presently earning? A. Yes.

Q. By how many dollars a day?

A. I would say about \$4—let's see—it would be three dollars and a half a day.

Q. Following this accident, and at the Marine Hospital, [92] would you state whether or not anyone representing the U. S. Navy came to see you?

A. Please repeat that.

Q. Would you state whether or not anyone in the uniform of the U. S. Navy came to see you at the hospital? A. Yes, they did.

Q. Do you know who it was presently by name?

(Testimony of James C. Gibbs.)

A. No.

Q. Who did they say they were, if such statement was made?

A. They said they were investigating the accident aboard the Antietam.

Q. And they questioned you there about it, did they? A. Yes.

Q. And you answered those questions?

A. Yes.

Q. With further regard to your present complaints, do you think that your sleep is disturbed at all at the present time or can you sleep reasonably well?

A. Not sometimes for several hours after I go to bed until this thing quits throbbing and aching.

Q. Would you state whether the weather has or has not any effect on the injured part?

A. Yes, I believe it does.

Q. What effect does it have, if any?

A. Well, I believe in cold weather it affects me by [93] stiffening it up and making it more difficult to walk. It seems to ache more in cold weather.

Q. Have you made any statements to persons other than these naval officers to whom I just referred? A. No, not about the accident, no.

Q. Do you have any recollection as to whether when the explosion or the great wind occurred, when you were at position here (indicating), before the blueprint, whether you were thrown any dis-

(Testimony of James C. Gibbs.)

tance, or did you find yourself, if you know, within that same area? A. I don't know.

Q. Have you told us everything you know presently about what happened in that compartment?

The Court: Well, that's a fairly big order. If you have forgotten, you can always come back to it.

Q. (By Mr. Ashe): I did ask your age presently, did I? A. 36.

Mr. Ashe: I trust that Your Honor will be willing to take judicial notice of the 1941 mortality table, and may I state to Your Honor——

The Court: You mean as to life expectancy?

Mr. Ashe: Yes, Your Honor.

The Court: Well, I suppose it might have some materiality. Usually it has not except in cases where there is a rather complete disability. It is hard to apply it in the case where [94] there is——

Mr. Ashe: I will assure you that the medical evidence in this case will show that he has a very serious disability which he is going to have the rest of his life.

The Court: Well, it can't do any harm to take judicial notice. What is the life expectancy?

Mr. Ashe: According to this table he has a life expectancy of 32.59 years.

You may cross-examine.

The Court: Mr. Ashe, are you going to have a doctor in this matter?

Mr. Ashe: I should explain that to Your Honor. He is in another court.

(Testimony of James C. Gibbs.)

The Court: How about the Government; are you going to have any medical testimony?

Mr. Bergman: The only medical testimony which will be used by the Government is that of Dr. Wagner, whom I understand libelant is going to call.

The Court: You will have the doctor here?

Mr. Ashe: I have subpoenaed him, Your Honor.

Cross-Examination

By Mr. Bergman:

Q. Mr. Gibbs, Dr. Wagner, your physician at the Marine Hospital, he was your doctor there substantially all of the time?

A. Yes, he was in charge of the proceedings, yes. [95]

Q. Are you now working for the Navy Department at the Yard, is that it? A. Yes.

Q. As I understood you, your rate of pay now is \$4 over what it was at the time of the accident, is that correct, approximately?

A. I would say approximately, yes.

Q. Is it true that you had been working for the Navy Shipyard here at San Francisco since the accident with the exception of some three months?

A. No.

Q. You worked as a carpenter for three months.

A. I have been laid off twice since the accident.

Q. Oh.

A. The exact length of time in between the lay-offs, I do not remember exactly.

(Testimony of James C. Gibbs.)

Q. Those were the result of reduction in force, were they not? . . . A. Yes.

Q. Is it not true that on a number of occasions since the accident, approximately three or four times, you have received notices of separation from your work because of reduction in force and those notices have from time to time been extended?

A. No. I received two reduction in force notices and I was laid off both times. [96]

Q. How long have you been working at the job you have there at the Yard now?

A. I came back, I believe it was June, 1950, the last time.

Q. Then you haven't lost any wages thus far as a result of your injury, is that correct?

A. No, not at the Navy Yard.

Mr. Bergman: Nothing further.

(Witness excused, with reservation to recall, to permit Dr. Wagner to take the stand.)

* * *

[Endorsed]: Filed July 5, 1951. [96A]

[Title of District Court and Cause.]

REPORTER'S SUPPLEMENTAL TRAN-
SCRIPT RELATING TO APPLICABILITY
OF THE DOCTRINE OF RES IPSA LO-
QUITUR AND FAVORABLE HOLDING
BY THE COURT

2 P.M. January 5, 1951

(Dr. Wagner excused.)

* * *

Mr. Ashe: The next point which concerns me, unless there is an objection at this time, is the question, of course, of the applicability of the doctrine of res ipsa loquitur.

(Argument in support of the applicability.)

The Court: Does the Government dispute that the doctrine of res ipsa loquitur applies here?

Mr. Bergman: The Government is willing, if your Honor feels he has enough evidence to consider that point, to submit it now for determination.

* * *

The Court: I think you have enough to satisfy the general principles.

* * *

Mr. Bergman: There is no use, your Honor, for me to prolong the matter any more. The Government feels the situation—and has no objection—is one where the doctrine of res ipsa loquitur applies * * *.

The Court: In view of what counsel for the Government said, I don't think it will be necessary to proceed any further. I will hold a prima facie showing has been made.

* * *

The Court: We can consider the record completed in the case, with the understanding that we had today * * * Is there anything else that you need to put in now? I have held that the doctrine of res ipsa loquitur applies. So the only legal question that remains is to whether or not there has been an election of remedy * * *

(Matter continued to January 26, 1951, 2 p.m.)

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to type-writing to the best of my ability.

/s/ H. CANNON.

[Endorsed]: Filed August 30, 1951.

Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court in the above-entitled case and that they constitute the record on appeal as designated by the parties:

Libel in Personam.

Answer of Respondent United States of America.

Opinion.

Supplementary Opinion.

Libelant's Proposed Amendments to Findings of Fact and Conclusions of Law.

Findings of Fact and Conclusions of Law.

Decree.

Notice of Entry of Decree.

Petition for Appeal.

Order Allowing Appeal.

Notice of Appeal.

Assignment of Errors.

Citation on Appeal.

Cost Bond on Appeal.

Supplement to Petition for Appeal.

Stipulation for Extension of Time in Which to Docket Apostles on Appeal.

Order Extending Time to Docket Apostles on Appeal.

Designation of Apostles on Appeal.

Counter-Designation of Apostles on Appeal.

3 Volumes of Testimony.

Libelant's Exhibits: Nos. 1, 2, 3, 4, 5, 6, 7 & 8.

Respondent's Exhibits: A-1, A-2, A-3; C-1, C-2, C-3; D-1, D-2, D-3; E-1, E-2, E-3; F-1, F-2, F-3; G-1, G-2, G-3; H; I-1, I-2, I-3, I-4, I-5, I-6, I-7; J, K, L, M, N, O, P, Q, R, S & T.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 16th day of August, 1951.

C. W. CALBREATH,
Clerk.

By /s/ E. H. NORMAN,
Deputy Clerk.

[Endorsed]: No. 13057. United States Court of Appeals for the Ninth Circuit. James C. Gibbs, Appellant, vs. United States of America, Appellee. Apostles on Appeal and Supplemental Apostles on Appeal. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 16, 1951. Supplemental Apostles Filed September 5, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13057

JAMES C. GIBBS,

Libelant-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY PURSU-
ANT TO RULE 19 (6)

To the Honorable Justices of the Court of Appeals
for the Ninth Circuit, at San Francisco, Cali-
fornia:

Comes Now Appellant in the above-entitled mat-
ter and respectfully urges and asserts the following
errors in the findings of fact, conclusions of law,
decree and judgment of the Honorable Louis E.
Goodman, District Judge, which are herewith re-
cited as a statement of points upon which the ap-
pellant intends to rely.

I.

The Honorable District Court erred in refusing
to incorporate libelant's proposed amendments to
the findings of fact so as to include a finding that
the libelant was injured in the course of his em-
ployment on November 19, 1946, aboard the USS
Antietam, by reason of the negligence of the re-
spondent, United States of America. The respond-

ent having stipulated that the doctrine of *res ipsa loquitur* was applicable and the Court having so ruled, the failure of the respondent to introduce any evidence in explanation of the explosion which admittedly caused libelant's injury, there could be but one conclusion, to wit, that the injuries sustained by the libelant were proximately caused by the negligence of the respondent.

II.

The Honorable District Court erred in declaring that the mere acceptance of hospital and medical benefits by a shoreside civilian employee of the United States (prior to the 1949 Amendment to the FECA which made the remedy exclusive), was in and of itself an acceptance of "compensation" under the Federal Employees' Compensation Act of 1916.

III.

The Honorable District Court having erred in declaring the acceptance of hospital and medical benefits to be an "acceptance of compensation," erred further in then declaring that the acceptance of such "compensation" (hospital and medical benefits) was, *per se*, an Election of Remedies—and precluded libelant from pursuing a libel in admiralty under the Public Vessels Liability Act, 46 USCA, 781 *et seq.*

IV.

The Honorable District Court erred in concluding that hospital benefits and medical services are pro-

vided under the Federal Employees' Compensation Act and are part of the employee's compensation.

V.

The Honorable District Court erred in dismissing libelant's libel herein.

Respectfully submitted,

BELLI, ASHE & PINNEY,

By /s/ LOU ASHE,

Proctors for Libelant-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 31, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER
AS TO EXHIBITS

It Is Hereby Stipulated and Agreed by and between Appellant and Appellee, acting by and through their respective proctors, that in order to save further costs of printing, all exhibits heretofore admitted in evidence herein need not be printed, and that the same may be considered by the Court in their original form.

Dated this 4th day of September, 1951.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

/s/ LEAVENWORTH COLBY,

/s/ KEITH R. FERGUSON,
Special Assistants to the Attorney General, Proctors
for Appellee.

BELLI, ASHE & PINNEY,

By /s/ LOU ASHE,
Proctors for Appellant.

So Ordered:

/s/ WILLIAM DENMAN,

/s/ HOMER BONE,

United States Circuit Judges.

[Endorsed]: Filed September 7, 1951.

No. 13,057

**In the United States Court of Appeals
for the Ninth Circuit**

JAMES C. GIBBS, LIBELANT-APPELLANT

v.

UNITED STATES OF AMERICA

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTH-
ERN DIVISION**

BRIEF FOR THE UNITED STATES

HOLMES BALDRIDGE,
Assistant Attorney General.

CHAUNCEY F. TRAMUTOLO,
United States Attorney.

**LEAVENWORTH COLBY,
KEITH R. FERGUSON,**
Special Assistants to the Attorney General.

C. ELMER COLLETT,
Assistant United States Attorney.
Attorneys for the United States.

FILED

JAN 17 1952

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 13057

JAMES C. GIBBS, LIBELANT-APPELLANT

v.

UNITED STATES OF AMERICA

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTH-
ERN DIVISION*

BRIEF FOR THE UNITED STATES

JURISDICTION

The jurisdiction of the District Court rests upon the Public Vessels Act, 1925 (46 U.S.C. 781-780), by reason of a libel in admiralty filed September 23, 1948, to recover damages for injuries aboard the USS ANTIE-TAM on November 19, 1946.

This Court's jurisdiction rests upon 28 U.S.C. 1291 by reason of a notice of appeal, filed June 14, 1951, from a decree in favor of the respondent United States, entered on March 30, 1951.

QUESTIONS

Appellant, a shoreside civil service employee of the San Francisco Naval Shipyard, was injured while

working as a member of a mixed gang of civil and military service employees engaged in repairing the ammunition compartments aboard the aircraft carrier USS ANTIETAM. He had two remedies, one under the Public Vessels Act, the other under the Federal Employees' Compensation Act. He was furnished hospitalization and medical treatment under Section 9 of the Compensation Act, but did not claim monthly payments of compensation thereunder, electing instead, pursuant to Section 8 of the Act, to use his accrued and advanced sick leave to remain at all times in a full pay status. The questions are—

1. Whether in the absence of an explicit statutory direction for double recovery or election, the injury, illness or death in the performance of duty of civil, unlike military, service employees of the United States gives rise to a right of recovery against the Government or whether the sole right of civil and military employees alike is to the benefits of the compensation, paid leave and retirement statutes applicable to employees of their particular type.

2. Whether acceptance of benefits in accordance with the applicable compensation and leave statutes precludes government personnel or their dependents from thereafter maintaining suit for injury, illness or death against the United States.

STATUTES

The Federal Employees' Compensation Act, 1916, as amended, provides in pertinent part (5 U.S.C. 751, 757, 758, 759, 790) :

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.

* * * * *

Sec. 7. * * * *Provided,* That whenever any person is entitled to receive any benefits under this Act by reason of his injury, or by reason of the death of an employee, as defined in section 40, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall elect which benefits he shall receive. Such election shall be made within one year after the injury or death, or such further time as the commission may for good cause allow, and when made shall be irrevocable unless otherwise provided by law.

Sec. 8. That if at the time the disability begins the employee has annual or sick leave to his credit he may, subject to the approval of the head of the department, use such leave until it is exhausted, in which case his compensation shall begin on the

fourth day of disability after the annual or sick leave has ceased.

Sec. 9. That for any injury sustained by an employee while in the performance of duty, whether or not disability has arisen, the United States shall furnish to the employee all services, appliances, and supplies prescribed or recommended by duly qualified physicians which, in the opinion of the commission, are likely to cure or to give relief or to reduce the degree or the period of disability or to aid in lessening the amount of the monthly compensation. Such services, appliances, and supplies shall be furnished by or upon the order of United States medical officers and hospitals, but where this is not practicable they shall be furnished by or upon the order of private physicians and hospitals designated or approved by the commission. For the securing of such services, appliances, and supplies, the employee may be furnished transportation, and may be paid all expenses incident to the securing of such services, appliances, and supplies, which, in the opinion of the commission, are necessary and reasonable. All such expenses when authorized or approved by the commission shall be paid from the employees' compensation fund. * * *

* * * * *

Sec. 40. That wherever used in this act— * * *

The term "compensation" includes the money allowance payable to an employee or his dependents and any other benefits paid for out of the compensation fund: * * *

STATEMENT

On November 19, 1946, an explosion occurred in a rocket ammunition storage compartment aboard the

aircraft carrier USS ANTIETAM, then undergoing repairs at the San Francisco Naval Shipyard. Appellant and other shoreside civil and military employees of the Navy, forming part of a mixed civil and military work gang, were injured. The circumstances of the explosion, necessarily involving matters affecting the national security, would not admit of the full disclosure required for judicial determination of the absence or existence of negligence or other fault on the part of libelant's fellow servants. The Government concluded that the national interest would be best served by not attempting a trial of that issue. Accordingly, pursuant to the settled policy in such situations, the United States conceded formally that the case might be adjudicated as one within the doctrine of *res ipsa loquitur* (R. 169-170). The court below made no findings respecting the alleged negligence on the part of libelant's fellow servants. The trial was directed solely to the question of whether appellant, in addition to his rights under the compensation, paid leave and retirement statutes, had also a right to recover damages by suit against the United States.

Appellant at all times pertinent was and still is a shoreside civil service employee of the Navy (R. 30, 167). He was first employed in 1940 and had held supervisory positions (R. 71, 83-84, 90, 123). On November 19, 1946, the day of his injury, he was serving at the San Francisco Naval Shipyard (R. 31). At the time of his injury he was engaged with a mixed gang of civil and military service employees in repairing an ammunition compartment for the storage of rockets aboard the USS ANTIETAM (R. 134-136, 138). An ex-

plosion occurred in the course of their work as a result of which appellant and other military and civil employees were injured.

Appellant by reason of his six years of government service and his former position as a supervisor was familiar generally with the statutory rights of civil service employees to hospitalization, treatment, paid leave and disability benefits and with the requirements for obtaining them (R. 83-91). Appellant had fifty-eight to sixty days of accrued sick leave standing to his credit (R. 71). Accordingly, he did not file a Form CA-4, "Claim for Compensation on Account of Injury" for payment of disability benefits (R. 59, 76). Instead he exercised his right in accordance with Section 8 of the Compensation Act (5 U.S.C. 578) to use, first, this accrued sick leave for two and a half months and then to obtain, second, an advance of sick leave so that he returned to work after nearly four months without collecting cash compensation by means of never being out of a full pay status (R. 80, 94-95, 98, 99, 100).¹ At the time of his injury appellant was not able to fill out the necessary forms and in order to provide for his hospitalization, compensation form CA-1, "Notice of Injury" was executed on appellant's behalf by Mrs. Hilda Lier, Compensation Clerk at the Naval Shipyard (R. 55, 58, 64). At that time appellant was in need of treatment but was too dazed to give consideration to the requirements and effect of his hospitalization as a com-

¹ Compensation Form CA-3 (Respondent's Exhibit A-1) shows that appellant was out sick a total of 109 days or nearly four months (from November 20, 1946 to March 10, 1947). His accrued leave of 58 or 60 working days carried him two and a half months (from November 20, 1946 until February 7, 1947). He was then advanced sick leave to cover the remainder of the four-month period.

pensation beneficiary (R. 89, 91). But although appellant knew he was being hospitalized at government expense under the Compensation Act and that the required forms must have been executed for him, he remained in the hospital 14 days and was under out-patient treatment for more than six months without objection (R. 84, 89, 92, 101, 152). Appellant never at any time repudiated the Notice of Claim executed by Mrs. Lier on his behalf, or attempted otherwise to reject the benefits of the Compensation Act, including his collection of four months paid leave under section 8 of the Act.

The court below rejected the Government's long established position that the right of civil and military employees under the compensation, paid leave and retirement statutes was exclusive. However, on the basis of the foregoing evidence, the court found that appellant "was fully aware and cognizant of the hospital and medical benefits available to him * * * under the Federal Employees' Compensation Act," and "* * * with such knowledge, applied for, received and accepted hospitalization and medical attention as a benefit under said Act" (R. 31). The court concluded that hospitalization and treatment are a part of compensation benefits and that by accepting them appellant "made his election to accept compensation" which "bars and estops him from recovery * * * under the Public Vessels Act" (R. 32).² A decree for the United States followed.

² The court thus found it unnecessary to reach the question of whether appellant's election to collect accrued and advanced sick leave at full wages constituted acceptance of compensation, in accordance with section 8 of the Act.

Relying on the rule that the successful party may not appeal but is entitled to urge any ground in support of the correctness of the decision, although rejected by the court below,³ the United States, having been successful and having nothing to appeal from, took no appeal from the District Court's refusal to hold appellant's compensation, paid leave and retirement rights exclusive or to apply the fellow servant rule. Appellant, however, appeals to this Court from the lower court's holding that acceptance of statutory benefits precluded his recovery and the Government renews its contentions as added grounds for affirmance.

ARGUMENT

I

Appellant's Rights under the Applicable Compensation, Paid Leave and Retirement Statutes Are Exclusive of Recovery by Suit; the Nature of the Operations of the Armed Services Confirms the Necessity of This Rule

Appellant's recovery of damages for service-incident injury is precluded by the existence of his rights under the applicable system of compensation, paid leave and disability retirement statutes. In *Feres v. United States*, (1950) 340 U.S. 135, the Supreme Court held that recovery for service-incident injury or death of military service employees may not be had by suit under whatever jurisdictional statute is otherwise applicable. The question of whether the same rule applies to similar service-incident death, injury or illness of civil service employees has given rise to diver-

³ *United States v. Amer. Ry. Exp. Co.*, (1924) 265 U.S. 425, 435; *Langnes v. Green*, (1931) 282 U.S. 531, 538; *Story Parchment Co. v. Paterson Co.*, (1931) 282 U.S. 555, 560; *Helvering v. Gouran*, (1937) 302 U.S. 238, 245.

gent views in the lower federal courts. The majority have held that absent an explicit command for double recovery or election, where service-incident injury, illness or death of government employees, whether in civil or military service, is involved, the right to compensation, paid leave and disability retirement is exclusive and precludes the existence of any right of action for tort despite the undoubted existence of a judicial remedy for the enforcement of such causes of action where there is such a right. *Johansen v. United States*, (2d Cir., 1951) 191 F. 2d 162; *Mandel v. United States*, (3d Cir., 1951) 191 F. 2d 164;⁴ *Posey v. Tennessee Valley Authority*, (5th Cir., 1937) 93 F. 2d 726; *Lewis v. United States*, (D.C. Cir., 1951) 190 F. 2d 22, cert. den. 342 U.S. 869. The Fourth Circuit alone has explicitly held the contrary. *United States v. Marine*, (4th Cir., 1946) 155 F. 2d 456, followed in *Johnson v. United States*, (4th Cir., 1950) 186 F. 2d 120.

We submit that this unanimity of decision in four out of five circuits in refusing to draw any distinction between service-incident injury and death of civil and military service employees should be accepted by this Court as controlling in this present case despite the minority view of the Fourth Circuit. Our brief in the companion case, No. 12,906, *United States v. Vatuone*, discusses the various decisions and argues in detail the reasons for the correctness of the majority rule of four out of five circuits. We do not repeat that argument here but ask the Court to refer to our *Vatuone* brief for its complete presentation.

⁴ Upon the joint application of the two libelants and the United States, certiorari in the *Johansen* and *Mandel* cases was granted January 2, 1952.

This view of four out of five circuits, if accepted, is dispositive of appellant's entire case and renders unnecessary any consideration of the fellow servant and election of recovery questions discussed in points II and III, *infra*. We do believe, however, that a word should be said about the reasons why Congress could not have intended that government-employed civilian repairmen should alone enjoy both the right to compensation and the right to recover damages.

The necessity for the exclusiveness of compensation in the case of civil as well as military employees of the army and navy who are engaged in the repair of military vessels is evident upon consideration of the nature of their work. If appellant and his fellow workmen—civil and military—had been employees of a private repair yard working on a commercial vessel there would be no question but that their compensation rights would be exclusive. *First*, it is obvious that the circumstances that appellant was one of the civil members of a mixed gang of civil and military employees of the Defense Department engaged in work on defense features of a military vessel makes it even more important that he, like military and private employees, be limited to compensation and excluded from recovery on the theory of tort liability.

In the present case, the work was being done by a mixed crew of civil and military employees and involved defense installations. As is usual in such cases, the national security did not permit disclosure concerning the facts surrounding the accident so as to permit the United States to defend. Thus, if compensation is

not exclusive, the taxpayers must accept the burden of liability based on a broadened doctrine of “*res ipsa loquitur*” or even as in the *Mandel case*, (*supra*, 74 F. Supp. 754, reversed, 191 F. 2d 164) upon a default judgment entered because of inability of the United States safely to produce the record of the Board of Investigation into the casualty.

Second, the unlikelihood of the construction, that government-employed ship repairmen if in the civil and not the military service are entitled to both compensation rights and the right to recover damages, having ever been intended by Congress is still more obvious when the compensation benefits available to privately-employed ship repairmen, to civil-service employees and to their fellow military-service employees, are compared. The benefits under the Federal Employees' Compensation Act are always incomparably more liberal than those of the other two groups. Thus, the injured private employee's compensation is only two-thirds of his pay, but not to exceed in any case more than \$35 per week (33 U.S.C. 908, 906), but the civil service employee's compensation may amount to as much as \$525 per month and is increased from two-thirds to three-fourths of his pay if he has dependents (5 U.S.C. 754, 756). In case of death the advantage for civil employees is still greater. In the event of the death of a soldier or sailor regardless of rank, a wife and one child is entitled to \$78 per month with \$15 for each additional child (38 C.F.R. 1946 Supp. 35.06, p. 5913). Under the Federal Employees' Compensation Act, a wife receives 45 percent of the decedent's pay,

a wife and one child 55 percent, and additional children 15 percent each, but not to exceed in all three-fourths of the decedent's pay or \$525 per month (5 U.S.C. 760). The widow of a privately employed ship repairman, on the other hand, receives only 35 percent of the decedent's wages taken at not to exceed \$52.50 and each child 15 percent additional, but not to exceed in all the comparatively insignificant sum of two-thirds of \$52.50 or a total of \$35 per week (33 U.S.C. 909). The rights are thus very unequal even without giving the civil employee a double right to damages as well as compensation.

We thus believe it improbable in the extreme that Congress intended to place civil service employees in a position so far superior both to private ship repairmen and to their fellow workmen in the military service. It is not believable that Congress intended them to have the right to collect not only many times the compensation of private and military employees but also the right to recover damages by suit against the United States.

II

Appellant's Actual Receipt of Any Benefits Whatsoever Pursuant to the Compensation, Leave and Retirement Statutes Precludes His Maintaining This Suit

Appellant appears to have learned by long service in supervisory posts how to obtain the maximum recovery under the Compensation Act. Appellant thus elected to collect not only his full wages as accrued but also sought and obtained advanced sick leave pursuant to Section 8 of the Compensation Act (5

U.S.C. 758) rather than seek disability benefits of 75 percent of wages under Sections 3 and 6 (5 U.S.C. 753, 756). Appellant similarly elected to continue to receive hospitalization and medical treatment under Section 9 (5 U.S.C. 759) as a compensation beneficiary. He here seeks to argue he never received "compensation" since he in fact received more under the Compensation Act. The Government believes that under established principles appellant's election of paid leave and medical benefits operates the same as receipt of cash compensation and constitutes a further bar to this present suit. It precludes any litigation of the broader question of whether the benefits of the compensation, leave and retirement statutes are exclusive of any cause of action for damages under whatever jurisdictional act may be appropriate.

The court below correctly held that appellant's election to receive any type of compensation benefits bars this suit. Appellant's insistence throughout, that his action in accepting the benefits of paid leave and hospitalization did not constitute a formal ratification of the applications for hospitalization and compensation made on his behalf in accordance with law is without merit. The general rule is stated in 71 Corpus Juris, p. 1488:

An election to take compensation under the statute as evidenced by bringing proceedings to secure compensation, even though compensation is denied, or the right thereto disputed, *or by accepting medical services . . .* bars an action to recover damages. (Emphasis supplied)

It is true that no express provision is made for elec-

tion but, as Mr. Justice Jackson said of this problem in *Feres v. United States*, (1950) 340 U.S. 135, 144:

This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death or those in armed services. We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.

However, we believe the general rule of preclusion from suit was correctly followed by the court below in this case when it held that acceptance barred any further action by appellant.

The Compensation Act expressly provides in Sections 9 and 40 (5 U.S.C. 759 and 790) that hospitalization and medical treatment shall be provided its beneficiaries at the expense of the compensation fund and that the term "compensation" includes not only the money allowances but also medical, hospital and burial

benefits—"any other benefits paid for out of the compensation fund" (5 U.S.C. 790). Nothing anywhere in the statutes requires that a claim for cash compensation must first be filed before the claimant can be furnished medical care under section 9 or allowed to elect paid leave under section 8. On the contrary, the statutes and regulations alike provide that the CA-1, "Employee's Notice of Injury or Occupational Disease,"⁵ and the CA-16, "Official Superior's Request for Medical Treatment," are to be executed on behalf of the employee. It therefore avails appellant nothing to argue in the face of the statute that acceptance of medical benefits is not acceptance of compensation and to ask, if so, when is the election (Br. 22)? In the present case, at least, there is no problem. Appellant continued to accept benefits in the form of both advances of paid sick leave and hospitalization for many weeks after he had recovered sufficiently to be fully aware that the United States was supplying his hospitalization and paying him full wages pursuant to his election to receive them under section 8 of the Compensation Act.

Under both the Federal Employees' Compensation Act and State Workmen's Compensation Act acceptance of burial and medical benefits are held to bar suit. *Ocasio v. United States*, (D. Puerto Rico) 99 F. Supp. 601; *Mains v. J. E. Harris Co.*, (1938) 119 W. Va. 730, 197 S.E. 10, 12; *Hlas v. Quaker Oats Co.*, (1930) 251

⁵ It is to be noted that appellant attempts (Br. 11) to confuse the point by giving the title erroneously as "Employee's notice of injury and original claim for compensation and medical treatment." Compare Resp. Ex. A-1, photostat 14.

Mich. 393, 232 N.W. 201.⁶ The contention that the beneficiaries should not be bound because the Government takes the position that compensation is exclusive and never points out that, if it is in error, acceptance may constitute a further ground of preclusion is totally without merit. A related contention was rejected in *Talge Mahogany Co. v. Burrows*, (1921) 191 Ind. 167, 130 N.E. 865, 873, the court observing:

It is not the law that a person who has done an act, with full knowledge of all material facts, can avoid the consequences annexed by law to such act, by alleging and testifying that when he did it he was not advised that the law gave him a choice between that course and a different one, and that he afterward learned what the law was and chose the different course.

We submit that, equally in the case now at bar, this ground of preclusion by acceptance of medical and paid sick leave benefits fully supports the court below in dismissing appellant's libel.

⁶ Cases involving the provision of the Longshoremen's Act are not to the contrary. There Section (33 U.S.C. 907, 933) provides that acceptance of medical benefits shall not operate to effect an automatic assignment of the employee's cause of action against a third party. The corresponding provision of the Federal Employees' Compensation Act, it should be noted, does not provide for such an automatic assignment even in the case of money payments under an award. See Sections 26 and 27 (5 U.S.C. 776, 777).

III

Appellant, a Repairman, Is Not Entitled to the Benefit of the Jones Act or the Doctrine of Unseaworthiness and the Fellow-Servant Rule Bars Any Recovery for Negligence

Judicial decisions have brought the longshoremen employed by stevedores to work loading and unloading aboard ship within the protection afforded seamen by the traditional doctrine of the unseaworthiness of the vessel and the Jones Act exemption from the fellow-servant rule. *Seas Shipping Co. v. Sieracki*, (1946) 328 U.S. 85; *International Stevedore Co. v. Haverty*, (1926) 272 U.S. 50. Appellant, however, was not a longshoreman but a shoreside ship repairman and as such is excluded from the benefits of the protection which seamen and longshoremen enjoy. *Guerrini v. United States*, (2d Cir.) 167 F. 2d 352, 354, cert. den. 335 U.S. 843; *O'Connell v. Naess*, (2d Cir., 1949) 176 F. 2d 138, 140; *Martin v. United States*, (2d Cir., Nov. 30, 1951) — F. 2d —.

The reason of this rule of exclusion is obvious. Stevedoring is work which formerly was performed by the ship's crew. Indeed, on Alaskan voyages it continues to this day to be so performed. But in the case of repair mechanics, such as appellant, they are performing work not ordinarily done by seamen and they are therefore not classed with seamen. It is true that aboard military vessels it is not unusual to find repair personnel as members of the crew. This of itself, however, only shows the impropriety of the attempt to assimilate the operation of military transport vessels to that of merchant vessel operation.

From time immemorial merchant ships have been put

out of service and into a ship yard or at some other dock to undergo repairs. Invariably such repair work has been done by a gang of specially trained mechanics and not by members of the ship's crew. Union agreements would, in fact, entirely prevent the merging of the two groups of men where merchant shipping operations are involved. It was only to protect those doing crew members' work that the Jones Act was passed, not to protect shoreside mechanics engaged in ship repair.

Both where maritime employment is concerned and where the relationship between the United States and its employees, whether civil or maritime, is involved, state legislation may not alter the federal law. *Robins Dry Dock Co. v. Dahl*, (1925) 266 U.S. 449; *United States v. Standard Oil Co.*, (1947) 332 U.S. 301, 305-311. Accordingly the fellow-servant rule remains operative to the extent that it is not extinguished by either the Jones Act (46 U.S.C. 688) or the Longshoremen's and Harborworkers' Compensation Act (33 U.S.C. 905).

A scrutiny of the Longshoremen's Act and of the Federal Employers' Liability Act (45 U.S.C. 51), made applicable to seamen by the Jones Act, makes it clear, however, that the fellow-servant defense is abrogated only as to those employees covered by such Acts. The statutes abolishing the fellow-servant rule are limited by the object of the legislation to those employers who are required to furnish compensation or who are carriers; the abolition does not reach to employees who are beyond the ambit of the act. See e.g., *Price v. Railway Express Agency*, (1948) 322 Mass. 476, 479, 78 N. E. 2d 13, 16; *Southern Ry. Co. v. Taylor*, (D.C. Cir.,

1926) 16 F. 2d 517, 522. It is settled that employers of personnel not included in the operation of such acts can avail themselves of the fellow servant defense. Thus Section 5 of the Harborworkers Act (33 U.S.C. 905), denying employers the benefit of the fellow servant defense for failure to secure compensation payments, does not apply because Section 3 (2) of that Act (33 U.S.C. 903) excludes employees of the United States from its coverage.

This Court settled long ago that except to the extent that the Jones Act relieves maritime workers of the fellow-servant rule the latter bars recovery. *Hammond Lumber Co. v. Sandin*, (9th Cir., 1927) 17 F. 2d 760, cert. den. 274 U.S. 756; *Carstensen v. Hammond Lumber Co.*, (9th Cir., 1926) 11 F. 2d 142; *Western Fuel Co. v. Garcia*, (9th Cir., 1919) 260 Fed. 839; *The Hoquiam*, (9th Cir., 1918) 253 Fed. 627; *Mallory SS Co. v. Simmons*, (5th Cir., 1924) 2 F. 2d 970. Boynton, "The Fellow Servant Rule in Admiralty," (1926) 1 Wash. L. Rev. 195. Completely controlling is the *Sandin* case, *supra*. There a longshoreman was injured by the negligence of the mate and this Court held that only the longshoreman's enjoyment of the benefits of the Jones Act prevented him from being barred from recovery (17 F. 2d at 761). Here, appellant not being a seaman or a longshoreman does not enjoy the benefit of that Act and any recovery is barred by the fellow-servant rule.

We submit therefore that, entirely aside from the questions of preclusion by compensation, the decision of the court below dismissing the libel is fully sustained by the fellow servant rule.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the court below dismissing the libel should be affirmed.

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JANUARY 1952.

No. 13,057

IN THE

United States Court of Appeals
For the Ninth Circuit

JAMES C. GIBBS,

Libelant-Appellant,

VS.

THE UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court for the
Northern District of California, Southern Division.

CLOSING BRIEF OF APPELLANT.

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CLOSING BRIEF OF APPELLANT.

I. REPLY TO APPELLEE'S "STATEMENT OF FACTS".

A. "Soit Droit Fait al Partie."

Appellee's "statement" (Ap. B. 4) develops a "cloak and dagger" explanation of why the Government's negligence must forever be shrouded in silence. No such "explanation" appears in the record. We were not advised in the trial court that "the government concluded that the national interest would best be served by not attempting a trial of that issue", nor that the final concession regarding the applicability of the *res ipsa loquitur* doctrine was "pursuant settled policy in such situations".¹ In its answer, filed some *six months* after the filing of the libelant's libel, it specifically denied negligence and would not admit an explosion had occurred (R. 5, 8). The libel-

¹Government Brief, p. 5.

ant was put to his proof that an explosion had occurred. No request for closed hearing was made by the Government. At no time was the court impressed with the necessity for secrecy in the testimony of libelant regarding the cause of his injury. The fact of the explosion was reported in the daily press. There is nothing in the record to indicate that any "concessions" were made regarding the liability of the Government. It made no formal offer to stipulate its liability. Libelant argued the applicability of the doctrine which established his *prima facie* case. The Government offered *nothing* in rebuttal.

We desire to give no comfort to the enemy nor to affect the national security. However, we do *not* feel that the circumstances of the explosion necessarily involved the national security in this instance. Regrettably, whatever comfort was gained by the enemy in the knowledge that an aircraft carrier was the scene of an explosion during its overhaul, was a matter of public knowledge. Again, if the incidents of the explosion "would not admit of full disclosure",² then these incidents were known fully to the appellee, and if knowledge of the real cause of the explosion indicated liability, the entire matter could have been disposed of preliminarily by an admission of *that* fact with the further assertion of its special defenses, if any. *Public security does not require that a proper claimant be deprived of existing rights.*

In its brief, at page 11, the Government attempts to fortify its position by making reference to *Mandel v. United States*, 74 Fed. Supp. 754,³ wherein default judgment was entered against the United States for its failure to obey order of the court for the production of the record of the Board of Investigation regarding the casualty involved. *The record in this case involves no such element.* The Government, in its brief filed in the matter of

²Government Brief, p. 5.

³Reversed 191 F. (2d) 164, certiorari granted, January 2, 1952.

United States of America v. Vatuone, C.C.A., 9th, No. 12,906, at page 18, and making specific reference to the Gibbs case, admits that fact:

“The manner of the deaths and injuries in the present cases appears to involve no matter of the functioning of defense installations on army and navy craft nor of the military decisions of the superiors of the army and navy personnel involved.” (Emphasis added.)

Thus, the Government, in the one brief (Gibbs), argues that matters touching upon national security are involved, while in the other (*Vatuone*), admits *that no such consideration is before the court*. The opinion of the District Court herein held that the libelant Gibbs did have an election of remedies. What the Government now is suggesting is that this election should be destroyed by virtue of their claim of “privilege”, asserted for the first time on appeal. If the Government has consented to be sued, *it is in the same position as a private person*.

This problem has oft been presented to the courts. In *Bank Line v. United States*, 76 Fed. Supp. 801, 804, the court, appreciating the problem, stated:

“The Government cannot be made a party defendant without its consent; and I assume that the Government could have annexed to its consent an absolute privilege of non-disclosure of information in its possession. To the extent that it would have made the assertion of some claims against the Government futile, it would amount to a constriction of the scope of the Government’s consent * * * Congress has not here so circumscribed its consent to be sued. 46 U.S. C.A. Sec. 741, 742, 743, 781, 782. On the contrary, Sec. 743 directs that the principles of law and the rules of practice obtaining between private parties shall prevail. The consent, being general, amounts to an endorsement of the libel with the sovereign’s command ‘Soit droit fait al partie’ (Let right be done to the party). But right cannot be done if the Government is allowed to suppress the facts in its possession.”

The court properly points out:

“It seems to me that two public interests are here in conflict. The first is that justice shall be done between the litigants.”⁴

B. Government's attack on District Court opinion unsupported in record and violates rules on appeal.

Appellee at page 8 of its brief states:

“Relying on the *rule* that the successful party may not appeal but is entitled to urge any ground in support of the *correctness* of the decision, although rejected by the court below, the United States, having been successful and *having nothing to appeal from*, took no appeal from the District Court's refusal to hold appellant's compensation, paid leave and retirement rights exclusive or to apply the *fellow servant doctrine*.” (Emphasis added.)

Analysis of this statement indicates the Government's position to be (a) that there exists a *rule* in support of its contentions, (b) that it is urging grounds in support of the correctness of the decision in the District Court, (c) that it had nothing to appeal from, (d) that it raised the “fellow servant doctrine” as a defense below and that it was rejected.

Let us first examine the so-called “rule”. Appellee cites four cases in its support (page 8, fn. 3). Examination of these authorities convinces that but one of these is in any sense pertinent, *U. S. v. Amer. Ry. Exp. Co.*, 265 U.S. 425, 436. Yet, even this authority does not support appellee's flat statement of a so-called “rule”. The decision states in its relevant part:

“It is true that a party who does not appeal from a final decree of the trial court cannot be heard in op-

⁴The court further added: “It seems to me but a short step and a necessary one from these premises to the argument that where the Government is the complainant in a civil suit for damages, it should likewise be required to make its own choice—to resolve on its part which of two conflicting public interests it prefers in any particular instance.”

position thereto when the case is brought here by the appeal of the adverse party. In other words, the *appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary*, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross appeal, urge *in support* of a decree ANY MATTER APPEARING IN THE RECORD although his argument may involve an attack upon the reasoning of the lower court, or an insistence upon matter overlooked or ignored by it." (Citing cases.) (Emphasis added.)

There is but one matter properly argued in the Government's brief in actual *support* of the decree of the District Court, i.e., the effect of the acceptance of hospital and medical benefits in determining appellant's right to proceed under the Public Vessels Act.

However, it has now introduced *for the first time* its contention that the "fellow servant rule" bars appellant's recovery. This was *not* a matter which was before the District Court. It was not argued therein nor presented as one of the issues. There is *absolutely nothing in the record* to indicate that such a defense had been interposed or offered as a basis for the denial of liability.

Appellee's present argument, that rights under the FECA are exclusive, cannot conceivably be "in support of the correctness of the lower court decision" and certainly *constitutes attack upon it!*

The District Court opinion left no doubt that it assumed jurisdiction under the Public Vessels Act and declared the availability to appellant of an "election of remedies". The opinion has been widely cited, since its publication, in support of the doctrine that a shoreside civilian employee of the United States (at least prior to the amendments of October, 1949) had an election of remedies and was

not limited to his rights under the FECA. The Government must have its tongue in cheek when it states "it had nothing to appeal from" since it has consistently urged in our Federal courts throughout the United States that the FECA is the exclusive remedy of civilian workers of the United States, whether seamen or shoreside employees.⁵

Not only was there a failure to raise the alleged defense of "fellow servant" in the court below, but the Government *specifically denied any fellow servant was involved in the injury to appellant*. It set forth in its answer (R. 11) the following distinct defense:

"* * * That *none of the injuries or damages claimed to have been sustained by libelant was the result of any carelessness or negligence on the part of any of the officers, representatives, agents or employees of the United States of America, nor were the said injuries or damages sustained by reason of any insufficiency or unseaworthiness on the part of said vessel.*" (Emphasis added.)

Admiralty Rule 6 of this Honorable Court states:

"Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations, or pray different relief, or interpose a new defense, or make new proofs. Application for such relief may be made at any time after the perfecting of the appeal to this court, and *within fifteen days after the filing in this court of the apostles and upon at least five days' notice to the adverse party or his attorney of record.*" (Emphasis added.)

Admiralty Rules 7 and 8 set forth the manner in which such procedures are effected. The Government has taken none of these steps and now offers argument *in alleged*

⁵Mandel v. United States, 191 F. (2d) 164; *Johansen v. United States*, 191 F. (2d) 162; *Canon v. United States*, 188 F. (2d) 444; *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575; *Dahn v. Davis*, 258 U.S. 421, are but a few.

support of the correctness of the lower court decision by raising for the first time the issue of the applicability of the "fellow servant rule" and challenging the correctness of the lower court's decision of November 30, 1950, in which it clearly stated one of the issues to be: "Was the FECA the exclusive remedy of the libelants?" The court's decision on this issue is unequivocal.

"It is my conclusion that *the compensation statute was not the exclusive remedy* of the libelants in these cases." (R. 16.)

It is reasonable to conclude, therefore, that the Government is estopped presently to interpose the defense of the alleged "fellow servant rule", or to attack the decree "with a view to enlarging its own rights thereunder, or of lessening the rights of its adversary".

II. THE FECA WAS NOT THE EXCLUSIVE REMEDY AVAILABLE TO SHORESIDE CIVILIAN EMPLOYEES OF THE UNITED STATES PRIOR TO THE AMENDMENTS OF 1949.

Appellee, without having appealed therefrom, attacks the opinion of the District Court (R. 12), which held that the appellant had an election of remedies and that the Court did have jurisdiction under the Public Vessels Act.⁶

In its brief, at page 9, it conjures up a "majority rule", based upon the four cited cases. Admittedly, *Mandel v. United States*, 190 F. (2d) 22, and *Johansen v. United States*, 191 F. (2d) 164 (a split two to one decision), hold the civilian seaman's remedy exclusive under the FECA. Certiorari was granted January 2, 1952. The third citation of authority, *Posey v. Tennessee Valley Authority*, 93 F. (2d) 726 (often cited on this point and just as often rejected), is hardly authoritative nor indicative of a

⁶In support of its contentions it incorporates its brief in *U.S. v. Vatuone* (CCA 9th No. 12906).

“majority rule” and is, as the Honorable District Judge declares, “a decision based entirely on features of the Tennessee Valley Authority Act which have no analogy in other statutes here under consideration.”⁷

The fourth case, *Lewis v. United States* (D.C. Cir., 1951), 190 F. 2d 22, was decided after the passage of the amendments to the FECA of October, 1949, and is therefore inapplicable on the facts.

Thus, the alleged “unanimity of decision” becomes elusive when the authorities are examined, and what we do find is *a majority of opinion to the contrary*.

Citing *Dahn v. Davis*, 358 U.S. 421, the Government, through tortuous misconstruction and by employing strange legal forceps to extract a meaning obviously offensive to the context, cites the case as holding that compensation was the petitioner’s sole and exclusive remedy (Vatuone Brief, page 47). Far from holding what the Government desires to read into the opinion, Mr. Justice Clarke clearly stated at page 428:

“This reference to the two acts shows that the petitioner had two remedies, each for the same wrong and both against the United States, and therefore the question for decision takes the form, may the petitioner after having pursued one of his remedies to a conclusion and payment pursue the other for a second satisfaction * * *”

In *Brooks v. United States*, 337 U.S. 49, two army servicemen, while on leave, were struck by an army truck driven by a civilian employee of the Army. The Supreme Court held that the injured Army men had the right to bring an action under the Federal Tort Claims Act (28

⁷The Federal statute, creating the Authority, made the FECA exclusive. There being no other statute, by which the Government had consented to be sued for such injuries, the remedy under the FECA was held exclusive. At the time, the Federal Tort Claims Act had not yet been adopted by the Congress, and the Public Vessels Act could not apply.

U.S.C.A. 1948 ed. 2671), and that this right is in addition to all other rights enacted for the benefit of servicemen. In analyzing all relevant legislation, the Court again pointed out that the remedy under the FECA is elective, and not exclusive as here contended by the Government.

In *Brady v. Roosevelt Steamship Co.*, 317 U.S. 575, the suit was by a United States customs inspector for an injury sustained on a government owned vessel. The court held that the petitioner, a civilian employee, had the right to sue the United States under the Suits in Admiralty Act.

In *Panama R. Co. v. Minnex*, 282 Fed. 47 (CCA 5th), an injured employee of the Panama Railroad Company, which was wholly owned by the United States, was held to have an election between the FECA and a suit for damages against the United States.

This court in *Canon v. United States*, 188 F. (2d) 444 (CCA 9th), recognized the right of a civilian employee of an Army hospital to an election between rights under the FECA and the Federal Tort Claims Act. The court, through Justice Healy, stated:

“In a supplemental memorandum the government argues that the remedy provided by the Federal Employee’s Compensation Act is exclusive if appellant elected to receive the benefits of the Act, 5 U.S. C.A. Sec. 751 et seq., citing *Parr v. United States*, 10 Cir., 172 F. (2d) 462. Counsel says that by accepting the hospitalization, she accepted the Act’s benefits. The *Parr* decision relied on is express authority for the proposition that a person in appellant’s situation has two remedies against the United States for the same wrong, one under the Employee’s Compensation Act and the other under the Tort Claims Act, and that he has the option to select either remedy, but cannot pursue both. See also *Dahn v. Davis*, 258 U.S. 421 * * *” (Emphasis added.)

The court, in *White v. U. S.*, 77 F. Supp. 316 (D.C. New Jersey), declared the plaintiffs had an election of

remedies between the FECA and the Federal Tort Claims Act. Although the Government here argues that the Second and Third Circuit decisions represent "unanimity", it is interesting to note the court's observations in the instant case:

"The defendant [U. S.] concedes that there are cases holding that the Federal Employee's Compensation Act is not an exclusive remedy where a civil employee of the United States is injured while acting within the scope of his employment. *Panama R. R. v. Strobel*, 5 Cir., 282 F. 52; *Panama R. R. v. Minnix*, 5 Cir, 282 F. 47; *Payne v. Cohlmeier*, 7 Cir., 275 F. 803.⁸

In *Frader v. United States*, 91 F. Supp. 657 (D.C. S.D. NY.), involving injury to a civil service employee of the United States, the court held:

"It may be assumed that libelant *could have brought a suit against the United States* under the Public Vessels, Act, even though he was within the coverage of the Compensation Act. *Mandel v. U. S.*, D.C., 74 F. Supp. 754; *Johnson v United States*, 89 F Supp 65, Cf. *Jentry v. United States, D.C.*, 73 F. Supp. 899. Having *filed a claim* under the Compensation Act, and accepted compensation, he *elected* his remedy * * * (citing cases)." (Emphasis added.)

Cases have been decided in this Ninth Circuit without any discussion by the court of the effect of the FECA. *McInnis v. U. S.*, 152 Fed. (2d) 387; *United States v. Loyola*, 152 Fed. (2d) 126; *Thomason v. United States*, 184 Fed. (2d) 105.

Clearly, the conclusions reached in the *Johansen* and *Mandel* cases (supra) are not only in conflict with the

⁸*Panama R.R. v. Strobel* (supra) involved injuries to a United States Marshal injured on the Panama Railroad. *Payne v. Cohlmeier* (supra) held that while an employee may elect to take under the Compensation Act, he is not required so to do.

decisions of the Fourth and Ninth Circuits,⁹ but are also in direct opposition to the rulings of the United States Supreme Court.¹⁰

⁹*Johnson v. United States*, 186 Fed. (2d) 120 (CCA 4th), and followed in *United States v. Loyola*, 161 Fed. (2d) 126 (CCA 9th). See also: *United States v. Marine*, 145 Fed. (2d) 456 (CCA 4th), wherein a United States Customs Inspector was injured in the discharge of official duties while leaving a merchant vessel owned by the United States. The Court of Appeals for the Fourth Circuit denied the contention that he was limited to the remedy under the FECA and held that he had an election to accept benefits under that Act or to bring an action for damages under the Suits in Admiralty Act.

¹⁰Counsel for appellant in the *Mandel* case, in his Petition for Certiorari, states:

"The Court in the *Mandel* case (supra) did not render any analysis of the Statutes involved or of their legislative history, in making its interpretation, but relied upon what it deemed to be considerations of fairness and national security. Had the Court rested its decision upon the plain language of the Statutes and expressed Congressional purpose, a different conclusion would have been reached."

"The first authoritative expression was rendered in *Brady v. Roosevelt S.S. Co.* (supra), where an examination of the Suits in Admiralty Act was made, and the Court expressly stated that a right of action was given under that Act to a government employee injured on a government vessel. A comprehensive analysis of the legislation is set forth in the opinion of Chief Judge Groner in *United States v. Marine* (supra). Judge Groner first adverted to the Supreme Court's decision in the *Brady* case and then proceeded to make his own analysis of the Suits in Admiralty Act as follows:

"* * * we have no manner of doubt from the plain words of the statute, considered in the light of the ordinary rules of construction, that we are required to reach the same result. In substance, the provision in question is that whenever a proceeding in admiralty could be maintained against a privately owned and operated vessel, a libel in personam may be brought against the United States in the operation of its merchant fleet. We are not at liberty to alter or add to the plain language of the statute to effect a purpose which does not appear on its face. There is certainly no suggestion in this language, or in any other language of the Suits in Admiralty Act, which implies that the right is limited to persons outside the provisions of the Employee's Compensation Act, and it is a fair inference that if Congress had intended that result it would have said so in unmistakable terms. The fact, of course, is that the inference is directly the other way.'" (Emphasis added.)

Indeed, the Congress of the United States recognized that the FECA was *not* an exclusive remedy by its passage of the 1949 Amendment to the Act, providing that it should *henceforth* be exclusive. Unless we are to attribute to Congress the performance of nugatory acts, we must conclude that an injured government employee had an election of remedies prior to the 1949 Amendment to the FECA.¹¹

III. APPELLANT'S ACCEPTANCE OF MEDICAL BENEFITS AND ACCRUED SICK LEAVE DID NOT CONSTITUTE AN ELECTION TO PROCEED UNDER THE FECA.

The Honorable District Judge, in his opinion of November 29, 1950 (R. 18), stated:

"The case of *Gibbs v. United States* poses a somewhat different problem. Gibbs received certain benefits under the FECA, namely, medical and hospital attention. *He did not apply for nor did he receive any compensation payments * * **" (Emphasis added.)

The Government, in its brief, page 13, now suggests to this Court that (a) application for *compensation* was made *in behalf* of Mr. Gibbs "in accordance with law", (b) that this "application" was ratified by acceptance of medical benefits. The District Judge was under no such illusion.¹² The plain fact is, appellant *neither applied for*

¹¹In *United States v. A. J. Woodruff Co.*, 175 Fed. 776 (CCA 2nd), the court, interpreting a section of the Tariff Act, stated:

"A statutory provision, the meaning of which is not clear, should, of course, be construed with reference, not only to the whole statute, but to contemporaneous and even subsequently enacted statutes in *pari materia*. *Where, as in this case, the statute repeals or replaces an earlier law, any change of language is more consistent with a change of intent than with the purpose of defining or declaring the meaning of the language of the earlier repealed statutes.*" (Emphasis added.)

¹²The District Judge, in his opinion of February 13, 1951 (R. 24), explaining the reasons for additional hearings in the Gibbs matter, stated:

"It (the Court) did so because libelant Gibbs, *unlike* the other libelants in the consolidated cases, *received no monetary compensation* under the FECA, but only medical and hospital attention."

nor accepted compensation for his disability; he took none of the steps required for such application (see our Opening Brief, pp. 11-14).

It is also argued (page 13) that when appellant chose to return to work with cast and crutches rather than remain hospitalized, and was granted accumulated and advance sick leave by his department head, he was, at once, receiving benefits allegedly flowing from the FECA. This, too, is a misinterpretation and finds no support in the applicable statutes.

The right to sick leave does not flow from the FECA. Its authorization is found in Title 5, U.S.C.A. Sections 30 et seq., as amended March 4, 1936.¹³

It is adequately clear from the very wording of the FECA that the employee by using accrued sick leave, is *not* receiving compensation under the Act.

Title 5, U.S.C.A. Section 758, provided, prior to the amendments of 1949:

“If at the time the disability begins the employee has annual or sick leave to his credit he may, subject to the approval of the head of the department, use such leave until it is exhausted, *in which case his compensation (i.e. his disability payments) shall begin on the fourth day of disability after the annual or sick leave has ceased.*” (Emphasis added.)

Under this section, an employee, using the sick leave granted him as aforesaid, *is not, in fact, receiving compensation for his disability.* On the contrary, his compensation, if any, starts *only after the sick leave has been exhausted.* This sick leave is cumulative. It is in a less formal sense a deposit against a rainy day upon which he may draw in the event of illness or other family emergency. It is granted to him as part of his service to the

¹³Section 30h; advancement of sick leave; administrative officers may advance thirty days' sick leave with pay beyond accrued sick leave in cases of serious disability or ailments when required by the exigencies of the situation.

Government. It is for that very reason that he generally works at a wage less than those common in the industry for similar services. It is, in the best sense, an appreciation for his measure of devotion. It must necessarily be beyond the Congressional concept to hold that the use of his accumulated sick leave deprives him of his right to compensation for his disability and destroys his election of remedies.

A realistic analysis of the pertinent language of the FECA must lead to the conclusion that what the government employee actually has is a twofold benefit:

(1) He has a right in the event of his illness, to hospital and medical care. This right is his whether he is disabled or not.¹⁴

(2) If the employee is disabled, he is entitled to disability payments, as *compensation* for his injury.

It must logically follow that the mere acceptance of medical benefits cannot be construed as an *election* to receive *disability compensation under the FECA*.¹⁵ Since

¹⁴Title 5 U.S.C.A. Sec. 759 provided, prior to the amendments of 1949:

“Immediately after an injury sustained by an employee while in the performance of his duty *WHETHER OR NOT DISABILITY HAS ARISEN* and for a reasonable time thereafter, the United States *shall* furnish to such employee reasonable medical, surgical and hospital services and supplies unless he refuses to accept them.” (Emphasis added.)

The court’s attention is further invited to pages 12 to 14 of appellant’s opening brief, in which other pertinent statutory regulations are cited, in amplification of this particular point.

¹⁵At page 13 of its brief, the Government cites 71 C.J., p. 1488, and from it extracts a flat statement, which is not supported by the case cited as authority for the main declaration. *Talge Mahogany v. Burrows* (1921), 191 Indiana 167. Here, plaintiff brought a common law action against his employer. The latter had permitted his insurance to lapse. Following injury to the plaintiff, the defendant employer furnished the plaintiff with medical care and drugs. The trial court instructed the jury that it was not to consider the acceptance of medical care and drugs in determining whether or not there had been an election to proceed under the Indiana Workmen’s Compensation Act. The Appellate Court’s sole holding as to this point is simply that the jury had a right to consider the acceptance of these benefits and that the lower court in-

at the time that the medical relief is given there is, generally, no way of knowing whether the employee is disabled and qualified to receive disability compensation under the Act and if, in fact, following his medical care or hospitalization, there is no disability sufficient to deter him from his daily work, he has no claims, and he receives no disability compensation.

This dichotomy is further supported by the definition of "compensation" appearing in 5 U.S.C.A. 790(h):

"The term 'compensation' includes the money allowance payable to an employee or his dependants and other benefits paid for out of the compensation fund, *Provided, However, that this shall not in any way reduce the amount of the monthly compensation payable in case of disability or death.*" (Emphasis added.)

Although medical benefits fall within the definition of "compensation" since they are paid out of the compensation fund, *these benefits are not compensation for the disability* because of the provision that they "shall not in any way reduce the amount of the monthly compensation payable *in case of disability or death.*"

In amplification of the matters presented in our opening brief, pages 14 to 16, we urge that a realistic analysis of all the relevant statutory and administrative regulations impels the conclusion that had the appellant elected to proceed under the FECA, he could have received full compensation for his disability¹⁶ without any reduction for the medical benefits theretofore received. *However, he did not so elect and did not receive any disability compensation. Contrariwise, he chose to pursue an established remedy under the Public Vessels Liability Act.*

struction was to that extent erroneous. However, we cannot agree that this case, decided in the Indiana courts in 1921, is authority for the flat assertion of the theory announced in *Corpus Juris* that the acceptance of medical benefits is in and of itself an election of remedies.

¹⁶Mr. Gibbs returned to work on crutches and in a cast but was incapable of attending upon his job as a shipfitter, and his reason

IV. WE REPLY TO APPELLEE'S ASSERTION OF THE "FELLOW SERVANT RULE".

A. Appellee is estopped from raising this issue on appeal.

We have presented (*supra par. I. B.*) sound reason and authority, precluding appellee from raising the "fellow servant" issue on appeal for the first time. The record before this court (which appellee has not sought to amplify) demonstrates conclusively that the defense of "fellow servant" was neither raised, argued, urged or insinuated in the lower court.

Without waiving our objections, we urge that the presentation of this untimely defense is, with considerable premeditation, double barreled and calculated to impress this Honorable Court with the alleged dire dilemma of the Government in these situations. It is argued: (a) public security forbids disclosure of the fact; (b) liability must be "conceded"; (c) the Government is left helpless; therefore civilian shoreside government employees and others must be restricted to their rights under the FECA.

We know of nothing in the record to indicate that the public security was threatened nor that the Secretary of the Army or Navy passed upon the precise requirement that in this particular case, dire consequences would ensue if the results of a Board of Inquiry should be produced and submitted to the court for determination. No formal claim of privilege was made.

What appellee *now* argues is this: the explosion was brought about through the negligence of a fellow servant, but we could not show that fact in the court below because it would require disclosure of secret information. It then asks this court to assume (a) that the information, if produced, would have affected national security and (b) that the explosion occurred because of the negligence of a "fellow servant" *of the libelant* then and there employed at the time of the explosion. The explosion could conceivably have been caused by the negli-

for doing so was: "I would much rather be doing something than sitting around in a cast." (R. 81.)

gence of persons *other* than fellow servants of the libellant. The Government was in the best position to know the real facts of the explosion. Suffice it to say that appellee has failed to raise or prove this now asserted defense. Its assertion, under the circumstances, is virtually frivolous.

B. The fellow servant defense is, in any event, inapplicable.

Appellant's injury was unquestionably caused by an explosion aboard a vessel owned, operated, managed and controlled by the Government. It requires no profound thought to realize that appellant *had not been furnished* with a safe place in which to work, and that the Government was obviously negligent in failing to provide such a place for him. Appellee has furnished us with the case of *So. Ry. v. Taylor*, 16 Fed. (2d) 517. There the court held:

“While it is a general rule that employees entering the service of a common master become engaged in a common service and are fellow servants, there are duties imposed upon the master which he cannot ignore and still claim immunity under the fellow servant doctrine; for example, *he must provide his employees with a reasonably safe place in which to work and reasonably safe tools, appliances and machinery for the accomplishment of the work. He must employ reasonably competent employees to perform the respective duties to which they are assigned, and in some of the states it has been held that the master is obliged to adopt and promulgate safe and proper rules for the conduct of the business.*”

We reiterate that in order to rely upon the fellow servant doctrine, the burden of establishing the cause of appellant's injury was upon the appellee-Government. What is known is that there was an explosion followed by injury.

The entire legislative and judicial history of the concern by the Congress and the courts for the protection of seamen, *and others* engaged in maritime duties, indicates an intent to enlarge, rather than to limit, the obli-

gations of shipowners to members of the crew and others engaged in maritime pursuits.

In some aspects of the maritime law, there has been developed an absolute duty from the shipowner to his employees covering all within the range of the humanitarian policy. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94.¹⁷

Because of the hazards of maritime duty, the Acts (cited below) deny the employer the right to rely on the defense of fellow servant.

The Government argues that an action by a shoreside repairman, brought under the Public Vessels Act, cannot be sustained because the defense of fellow servant is available to it. Basically, it contends that such shoreside workers are not "seamen" within the meaning of the Jones Act; that they are excluded from the coverage of the Longshoremen's and Harbor Workers' Compensation Act and are left naked of any rights except those available under the FECA.

Thus, the shoreside Government employee has been singled out to be excluded from the "humanitarian policy" offering protection to maritime workers generally. It will be noted that according to the Government, *not all shore-*

¹⁷The various statutes, and their coverage, are reflected in the following:

(1) *Jones Act*, 46 U.S.C.A. 688—which made the FELA available to seamen:

(a) Stevedores are within the coverage of the Act. *International Stevedoring Co. v. Haverty*, 272 U.S. 50; *Buznski v. Luckenbach S.S. Co.*, 277 U.S. 226.

(b) Claims against the United States under the Jones Act may be enforced through the *Suits in Admiralty Act*, 46 U.S.C.A. 741-752, or the *Public Vessels Act*, 46 U.S.C.A. 781-790: *American Stevedore v. Parello*, 330 U.S. 446; *Canadian Aviator Ltd. v. U.S.*, 324 U.S. 215; *Mejia v. U.S.*, 152 Fed. (2d) 686; *Lauro v. U.S.*, 162 Fed. (2d) 32; *Thomason v. U.S.*, 184 Fed. (2d) 105.

(2) *Longshoremen's and Harbor Workers' Compensation Act*, 33 U.S.C.A. 903—stevedores, longshoremen and shoreside repairmen are covered by this Act (it specifically excludes from its coverage employees of the United States).

side repairmen are excluded but only those employed by the United States.

As Justice Holmes said in *International Stevedoring Co. v. Haverty* (supra):

“We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties *to vary with the accident of their being employed by a stevedore rather than by the ship.* The policy of the statute (the Jones Act) is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case, they should be in the other.”

Like Justice Holmes, “we cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by * * *” the Government rather than by a private concern, for wherever the Government has consented to be sued, it stands in the position of a private employer.

Injuries to shoreside employees (in cases arising before the 1949 amendments) should, under the humanitarian policy, be compensable in accordance with the election of the injured employee—an election which the District Judge said was available here to the appellant. The circumstance of appellant’s being employed by the Government should not permit the latter to escape liability by relying on the now almost antiquated fellow servant doctrine.

V. CONCLUSION.

A. The District Court opinion, supported by the weight of authority and by Congressional action, properly concludes that appellant had an election of remedies. The Government’s argument that the FECA is the exclusive remedy of a shoreside civilian employee of the United States is untenable.

B. A careful analysis of the applicable statutes conclusively establishes that the acceptance of accrued sick leave and medical benefits does not constitute an election to proceed under the FECA. The right to sick leave does not flow from the FECA, and medical benefits are not "compensation" for the disability.

C. The Government's argument that the causes of and the circumstances surrounding the accident must necessarily be shrouded in silence, because of an alleged threat to public security, is equally untenable, for reason that the record fails to support this contention, and there is no requirement that considerations of public security shall preclude a proper claimant from a just recovery.

D. The Government is precluded from attacking the judgment of the court below without having taken appeal therefrom.

E. Appellant falls within the range of the humanitarian policy extended by the courts and Congress to those engaged in maritime pursuits, and the fellow servant doctrine is therefore inapplicable to those in appellant's position.

F. The Government is estopped from relying on the fellow servant defense, for reason that it has failed to assert it in its pleadings or in the court below, and the record is devoid of any evidence to sustain this untimely contention.

For the foregoing reasons, appellant respectfully submits that the order and decree of the District Court adjudging an election of remedies to have been made be reversed and the case remanded to the trial court for the sole purpose of determining damages.

Dated, San Francisco, California,
February 11, 1952.

Respectfully submitted,
BELLI, ASHE & PINNEY,
Proctors for Libellant-Appellant.

No. 13058

**United States
Court of Appeals**
for the Ninth Circuit.

A. F. LEVY, Administrator,

Appellant,

vs.

JOHN E. SISSON and DORIS FISCHER,
Appellees.

Transcript of Record

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Southern District of California
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Los Angeles 27, Calif.

In the District Court of the United States in and for
the Southern District of California, Central
Division

Civil No. 12992-C

A. F. LEVY, as Administrator of the Estate of
Carrie F. Levi, Deceased.

Plaintiff,

vs.

JOHN E. SISSON, DORIS FISCHER, JOHN
DOE, and MARY ROE,

Defendants.

COMPLAINT

Damages, \$5,412.16

Plaintiff, appearing in his representative capacity, complains of the defendants and each and all of them and alleges:

I.

Said named plaintiff, A. F. Levy, (a major heir of said estate) on March 21st, 1950, was appointed Administrator, De Bonis Non. by the Superior Court of Los Angeles County California. Being a resident of said county and state and a citizen of the United States as the said named defendants, John E. Sisson and Doris Fischer so are also.

Said estate is entitled, "Estate of Carrie F. Levi, Deceased. Number 217-464 A. F. Levy Administrator, C.T.A. & B.B.N." and the files and records in said proceedings therein are hereby by reference made a part of this complaint. On April 6th, 1950, Plaintiff fully qualified to said trust and appoint-

ment, by taking the oath and posting a bond that was approved by said court and now is and ever since then has been the duly appointed and qualified administrator of said estate now pending in said court.

II.

Likewise and now pending in the same court since 1938 under number 179836, Doris Fischer (the within-named defendant) is likewise the Administratrix, or rather the Executrix under the will of Mathilda G. Mautner, and Carrie F. Levi is or was before her demise, a named heir to one-sixth ($1/6$) of the "Estate of Mathilda G. Mautner, Deceased." John E. Sisson was substituted in 1948 as Mrs. Fischer's attorney and ever since and now is acting of record in that capacity aforesaid. This complaint will be amended when the fictitious defendant names, "John Doe & Mary Roe" are discovered by their true names.

III.

This action arises under Title 8 Sections 43-47-48 U.S.C.A. being based upon the second section of Article III U. S. Constitution and Title 28, 1343, U.S.C.A. based upon the last sentence of Section 1 of the XIV Amendment to the Constitution, as hereinafter appears.

IV.

In 1941 about 3 years after the death of Mathilda G. Mautner, Carrie F. Levi, (Mrs. Mautner's aunt) suffered in her extreme old age, her first mental disturbance brought about by the tragic and most sudden death of her most beloved daughter. While

in this condition she was induced, in violation of law, to consent to being placed under guardianship in the same aforementioned state court. Entitled, Estate of Carrie F. Levi, Incompetent #206291. She quickly recovered from this mental upset and demanded the restoration of her property, but her property, again in violation of law, was held in hostility to such demand under color of law, known [3*] as Judicial Slavery'' in violation to the 13th amendment to the Constitution, prohibiting chattel slavery as well. The aged victim through the shadow of death, escaped one kidnap only to become the victim of another from which she cleverly made her escape. This attracted outside persons, (see Rolston v. Estate of Levi, Municipal Court, #509362) with a malicious and oppressive system of judicial robbery, from which the authorities would offer no relief therefrom, causing the victim to flee from California depriving local authorities of all jurisdiction of her person and property. Again in violation of her civil rights, her homestead cottage was sold, but after confirmation of the sale by the court the buyer threatened to put the other conspirators in jail unless they released them from the conspiracy and return the deposit which they did.

A frugal person in exile, her bank accounts dissipated, by payment of false claims aforesaid, attempting to sell property that could not be sold, fees, fees, and more fees with the property in great demand though left unproductive with no funds to meet living expenses at the place of her refuge—

*Page numbering appearing at foot of page of original Certified Transcript of Record.

she returned to California in the hope that the failure of her oppressors might cause them to relax. These conspirators being fully aided and abbetted by the courts as more clearly shown by the conclusive and unanswerable court records; such relaxment would not obtain, and the victim, though always envied for her exceptional ability, nevertheless was susceptible to the general weakness that always accompanies extreme old age, so was compelled to bring about the unnecessary and untimeliness of her own death, in which she disinherited first these conspirators in her will.

V.

Doris Fischer, within, then the wife of the victim's nephew and at all times mentioned herein and now was, and is fully conversant with these and the foregoing facts. When in the estate [4] proceedings these conspirators, in a fake trial and pretended hearing where it was plainly visible, but still clearer shown by the files and records in the Levi estate proceedings—had bought out the proponents of the will attorney—still the court adjudged that they were to take nothing under the will, because they had no evidence to introduce that the deceased victim of judicial slavery and robbery was ever of unsound mind or that anyone had ever attempted to use undue influence upon her in making her will, as they claimed in their will contest. Neither were they creditors or otherwise succeed to any part of the estate.

New conspirators joined the old ones who bribed

the surety to withdraw (without alleging any cause), their surety bond. An action for this conspiracy was immediately dismissed on the grounds that it does not show the slightest grounds for recovery from the conspirators, notwithstanding unanswerable court records show just the opposite is true and mandatory upon the court. The court clerk refused to accept a personal bond, contending that no matter how great the security, if subject to the slightest incumbrance its holder could not qualify as a lawful bondsman, which is absolutely false. But when fully unincumbered property highly in excess of the amount of the bond, in double the amount was tendered, they induced the court through abuse of court procedure that its presentment was untimely and too late.

Once having gained control of the deceased victim's estate the only duty they would perform which the law imposed upon them was to collect the rents from the tenants the previous representative had obtained, and refused to sell the perishable property, but instead caused some of the tenants to move so that it would be easier to sell the real property, which as above stated, the court determined afterward, that they had no interest whatsoever in same.

They refused to pay the valid claims against the estate, [5] causing the claims to almost double in interest. They paid themselves high fees, in mock trials where the suitors became both defendants and plaintiffs in the same action, subverting the laws and disproving the science of mathematics, which now have terminated in creditor judgments against the

estate. However they paid all the invalid claims of the decedents conspirators without observing the regular course of probate procedure. Engaged in litigation unauthorized by law, and carried on more litigation in the higher courts to determine who shall administer the estate after its assets were dissipated almost completely long before this question arose.

They acted as representatives both for the will, pretendingly, and also against the will and made persons who made no court application to succeed to part of the residue of the estate assets. They even administered upon the estate of your plaintiff within, as though he were a dead person, always awarding themselves high fees for this alleged highly-skilled useless and malicious work. And finally in the Decree of Distribution in the pretended closing of the Levi estate, they conferred upon the Superior Court the obligation to distribute to the "Heirs of the Levi" estate the remaining distribution from the Mautner estate when the same shall become payable; all contrary to law. (See Exhibit and page, thus A4-L9.) They wrote letters denying the very words of the statute, and even won court approval thereof. They belittled your plaintiff's demand that they follow the law, always suggesting that he employ a competent attorney, when they knew full well that an honest attorney could not be obtained and they could easily get the other kind to join them in their subversive activities. (D1*.) They threatened recriminative lawsuits that proved to be made in bad faith and not one thing has been settled, barred or abated, except to bring disdain

and disgrace upon certain public officials; break down what little confidence remains in judicial procedure and [6] they will find no way to bring an end to this litigation. Neither has the failure of the high courts to maintain the regular course of law below and its method of setting up falsehoods, and then confirming them without any hearing whatsoever have proved futile.

VI.

The last two paragraphs of conditions precedent, are typical of the concert action of Doris Fischer and John E. Sisson. She first changed attorneys for the reason aforesaid. (D1*.) Making it necessary to file request for Special Notice. (D1**.) Because of the mass of litigation already involved, all objections to the much faulty account was waived, and objections were only filed to the distribution planned by their predecessor conspirators. The usual custom was amplified, by notifying both parties that such contemplated distribution which was carried over from the void distribution of the Decree in the Levi estate, must not prevail contrary and repugnant to the very words of the statute. (A4 L9.) The entry in the register of Actions, 179836 formerly read "Jan. 31. Objection to distributions (A. F. Levy) Filed," but merely the date and Abbreviation "Object," has since been eradicated therefrom. (D1***.) On May 24th, 1950, as shown by the register, Waiver of Findings and Conclusions was signed by all attorneys. (DI-**** A2 L.7) and mentioned in the Mautner Decree. (A2 L.7.) But since nothing in the decree or court minutes state how it was adjudged

(A1 & D2) it appears contrary to sections 1230, 1220-1221 Probate Code. Likewise neither the decree or minutes show that Ida Wells was present at the trial or testified proving Sisson's statement in his letter false. One of the objectors could not appeal from an order in which findings have been waived. (B.1.L.17.)

VII.

Six days after the Mautner degree had been formally entered, directing distribution, heirs of the Levi estate in place of the Administrator, as directed by section 1023 and 571 Probate Code.

Action in the Municipal Court #994-994 under the authority [7] of section 1021 of the Probate Code, was commenced. Doris Fischer and her surety were made the principal defendants. Notwithstanding such authority, her attorney John E. Sisson filed a demurrer in bad faith, stating that it was filed in good faith, which Dishonorable Judge Green of the Municipal Court sustained, with leave to amend. (E.1 & 2.) Judge Green by his own record admits that he is a judge without dignity or honor, biased and prejudiced. He held it did not show the slightest ground for recovery.

VIII.

Enthused over this ill-gotten court ruling, Mr. Sisson on July 21, 1950 (D.I. * * *), filed a motion (without any grounds), to vacate the Decree of Distribution, to which all the attorneys had waived findings, etc., and entitled it, "Petition for instructions to set aside final account." He claimed fees,

extra fees and more fees for highly skilled work and now asks the court to allow the executrix to set aside the decree, when only the court has the power to do it. He, on the same date, sent a letter (placing a copy on file), which letter is herein reproduced in full. (B.I.) It's main object was to carry out the illicit distribution to the heirs of the Levi estate in a lesser amount than is set forth in the decree. (\$316.43 instead of \$375.96. See Decree & B.6.) Furthermore the heirs of the Levi Estate will not be known until all the inventoried property has been fully liquidated or abandoned and the expenses of administration, etc., paid. The entire letter fails to state anything but the truth and is loaded with deception, guile and trickery. Every effort was made (B.2-3-4 & 5) to induce Doris Fisher as executrix both before and after August 4th, 1950, at which time the probate court denied her misnamed petition to set aside the decree (D.I. * * *). Her home, which she acquired by dealing with the assets of the Mautner estate, in violation of 583 Probate Code, was attached and many letters (B.2-5) and conversations with her and her surety ensued. The latter claiming [8] that it was the court's duty to compel the executrix to carry out the terms of the decree and that there liability did not commence until judgment had been established against their risk. Recourse could not be had to the court because the Decree provided payment to the heirs and not the Administrator.

Thereupon the complaint was amended in substance only, seeking \$5,000.00 damages against both

Mrs. Fisher and Mr. Sisson. But otherwise not. (See C.4.L.7.) Again Mr. Sisson used his highly skilled powers in obstructing justice, with the willing tools know as courts clerk (B.6-7), and what should have only taken two minutes to get the case transferred to the higher court under 396 C.C.P. required two weeks. Without notice or any copy of this first amended complaint being served upon Mr. Sisson, he, nonetheless, by the same means that he knew it had been filed and was in the process of transferring, still he filed a demurrer to this first amended complaint (E3-4 B7). He had hoped to defeat the transfer knowing full well that Judge Green, true to form, would sustain this demurrer also if he ever got the chance to. All the papers, as required by law, except points and authorities filed to uphold the original complaint, have been sent up to the Superior Court and renumbered 576,203 where it has remained six months without being called for hearing. The hearing on this second demurrer would regularly come before Judge Stevens or Judge Patrosso. The former admits by his own built record that he is without honor or dignity and the latter likewise admits that he is biased and prejudiced. The amount of the full distributive shares (\$375.96) will only take care of half of the judgment claims almost 10 years past due.

Wherefore, That in pursuance of the said conspiracy or concert of action between the said Doris Fischer, executrix, and her attorney, John E. Sisson, as alleged or more clearly shown by the unanswerable files and records hereinbefore referred to,

showing [9] that the said defendants and each of them have, in violation of their oath, to wilfully and maliciously acted to defeat the will of Mathilda G. Mautner for which they were paid to uphold. That both and each of them have acted to hinder, impede and obstruct the regular processes of law, in violation of the due process clause of the Federal Constitution of the United States. That likewise they have attempted or are about to deprive and defeat the judgment creditors and heirs of the Estate of Carrie F. Levi of their property, and make for naught the efforts of the plaintiff within to give effect to the laws, customs and usages that would preserve the civil rights of said persons. And by reason of the premises plaintiff has suffered great inconvenience and harmfully annoyed and delayed in consequence thereof. And to his damage, Plaintiff, as Administrator of the Estate of Carrier F. Levi, Deceased, and for the benefit of said estate, prays for:

Statutory and exemplary damages in the	
sum of	\$5,000.00
Actual Damages for the conversion of dis-	
tributive share	375.96
Compensatory Damages for accrued court	
costs	37.20
<hr/>	
Total.....	\$5,412.16

Or total Damages in the sum of Five Thousand Four Hundred Twelve Dollars Sixteen cents (\$5,412.16)

and for such other relief as may seem proper and cost of suit herein.

/s/ A. F. LEVY,

As Administrator of the Estate of Carrie F. Levi,
Deceased.

Dated at Los Angeles, Calif., April 3rd, 1950.

Duly verified.

[Endorsed]: Filed April 4, 1951. [10]

[Title of District Court and Cause.]

MOTION TO DISMISS AND MOTION FOR JUDGMENT UPON THE PLEADINGS

Comes now Defendant, John E. Sisson, and moves the Court as follows:

I.

To dismiss the action because the complaint fails to state a claim against this Defendant upon which relief can be granted.

II.

That the action does not arise under the Article or Section of the Constitution of the United States referred to in paragraph III of the complaint or under any other Article, Amendment or Section thereof.

III.

That the matter in controversy herein does not really and substantially exceed, exclusive of interest

and costs, the sum or value of Three Thousand Dollars (\$3,000.00) as shown by the statements and allegations appearing in Exhibits A, B, C, D and E, and also as [14] set forth and alleged in paragraph VIII of said complaint.

It appears as a matter of law from the complaint that Plaintiff cannot recover in this action a sum, exclusive of interest and costs, in excess of \$3,000.00, and the matter in controversy in this action does not exceed, exclusive of interest and costs, the sum or value of \$3,000.00.

IV.

That by the allegations in Plaintiff's complaint it is definitely shown that the Defendant, John E. Saxon, and Henry Fischer are residents of the City of Los Angeles, County of Los Angeles, State of California.

V.

To dismiss this action because the complaint fails to state a claim against Defendant, John E. Saxon, upon which relief can be granted in that no matter or acts of this Defendant are alleged which in any manner state or create any liability.

VI.

In the event that the complaint is not dismissed for the reasons stated in paragraph V, to require Plaintiff to file and serve a more definite statement of the matters which are not averred with sufficient definiteness or particularity to enable this Defendant properly to prepare responsive pleadings or to prepare for trial.

VII.

Defendant moves this court requiring this Plaintiff to set forth in separate counts his claims insofar as they relate to this particular Defendant.

VIII.

Defendant also moves this court for a summary judgment in his favor for the reason the plaintiff has not stated any facts or matters in the whole or every part of his complaint which in any manner gives rise to any recovery in such action.

Dated this 27th day of April, 1951.

/s/ JOHN E. SISSON,

Attorney in Propria Persona.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 28, 1951. [35]

[Title of District Court and Cause.]

MOTION TO DISMISS AND MOTION FOR
JUDGMENT UPON THE PLEADINGS

Comes now Defendant, Doris Fischer, and moves the Court as follows:

I.

To dismiss the action because the complaint fails to state a claim against this Defendant upon which relief can be granted.

II.

That the action does not arise under the Article

or Section of the Constitution of the United States referred to in paragraph III of the complaint or under any other Article, Amendment or Section thereof.

III.

That the matter in controversy herein does not really and substantially exceed, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00) as shown by the statements and allegations appearing in Exhibits A, B, C, D and E, and also as [46] set forth and alleged in paragraph VIII of said complaint.

It appears as a matter of law from the complaint that Plaintiff cannot recover in this action a sum, exclusive of interest and costs, in excess of \$3,000.00, and the matter in controversy in this action does not exceed, exclusive of interest and costs, the sum or value of \$3,000.00.

IV.

That by the allegations in Plaintiff's complaint it is definitely shown that the Defendant, John E. Sisson, and Doris Fischer are residents of the City of Los Angeles, County of Los Angeles, State of California.

V.

To dismiss this action because the complaint fails to state a claim against Defendant, Doris Fischer, upon which relief can be granted in that no matter or acts of this Defendant are alleged which in any manner state or create any liability.

VI.

In the event that the complaint is not dismissed for the reason stated in paragraph V to require Plaintiff to file and serve a more definite statement of the matters which are not averred with sufficient definiteness or particularity to enable this Defendant properly to prepare responsive pleadings or to prepare for trial.

VII.

Defendant moves this court requiring this Plaintiff to set forth in separate counts his claims insofar as they relate to this particular Defendant.

VIII.

Defendant also moves this court for a summary judgment in her favor for the reason the plaintiff has not stated any facts or matters in the whole or every part of his complaint which in any manner gives rise to any recovery in such action.

/s/ DORIS FISCHER,
Appearing in Propria
Persona.

Dated this 22nd day of May, 1951.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 22, 1951. [47]

District Court of the United States, Southern
District of California, Central Division

No. 12992-C

A. F. LEVY, as Administrator of the Estate of
Carrie F. Levi, Deceased,

Plaintiff,

vs.

JOHN E. SISSON, DORIS FISCHER, JOHN
DOE & MARY ROE,

Defendants.

ORDER DISMISSING ACTION

The Motion to Dismiss of defendant, John E. Sisson, having been duly set and come on for hearing in Court Room No. 3, United States Courts, and Post Office Building, Los Angeles, California, on the 21st day of May, 1951, at 10:00 o'clock a.m., and the motion of Doris Fischer to dismiss, having come on for hearing on June 4, 1951, the Honorable James M. Carter, Judge presiding, the plaintiff appearing in propria persona and the defendants appearing in propria persona, and the court having been fully advised in the premises, accordingly,

It Is Ordered, Adjudged and Decreed that the Motions of defendants, John E. Sisson and Doris Fischer, to dismiss such action be, and the same are hereby, granted, and accordingly said action be, and the same is hereby, dismissed.

Said motions are granted upon the following grounds, and each of them, to wit:

(1) That said complaint fails to state a [61] claim; that said action does not arise under any Article or Section of the Constitution of the United States.

(2) That no diversity of citizenship is shown or alleged as between the parties plaintiff and defendant.

Said Motions to Dismiss having been so granted, and the action dismissed, the Motions for judgment on the pleadings, motions for more definite statement, etc., and motion to strike of said defendants were with the consent of said defendants withdrawn.

Dated this 7th day of June, 1951.

/s/ JAMES M. CARTER,
Judge.

[Endorsed]: Filed June 7, 1951.

Judgment entered June 11, 1951, Book 73,
Page 30.

EDMUND L. SMITH,
Clerk.

By /s/ C. A. SIMMONS,
Deputy. [62]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Rule 73(b)

To the Clerk of the Said Court:

Notice is hereby given that the above-named plaintiff, in his representative capacity aforesaid and named above, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the unsubmitted order dismissing the within action, as a final judgment entered in Book 73 at page 30 in the above-entitled action on June 11, 1951, and also from the subsequent order of July 9, 1951, denying the "Motion to Vacate This Judgment" and enter judgment for the plaintiff, or to amend or modify judgment appealed from so as to conform with state law, local District Court rules, or the rules of the Federal Rules of Civil Procedure.

/s/ A. F. LEVY,

Administrator of
Decedents Estate.

Dated July 10, 1951.

Los Angeles, California.

[Endorsed]: Filed July 11, 1951. [76]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 78, inclusive, contain the original Complaint; Motions of John E. Sisson and Doris Fischer to Dismiss and for Judgment Upon the Pleadings; Motions of John E. Sisson and Doris Fischer to Strike; Summons; Opposition to Motion to Dismiss; Order Dismissing Action; Motion to Vacate Judgment; Notice of Motion; Copy of Letter from Plaintiff to County Treasurer; Summary of Proceedings with Points and Authorities; Notice of Appeal; Request for Record; Corrections to Exhibit E attached to Complaint and a full, true and correct copy of Notice of Entry of Judgment and Minutes of July 9, 1951, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 16th day of August, 1951.

[Seal]

EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13058. United States Court of Appeals for the Ninth Circuit. A. F. Levy, Administrator, Appellant, vs. John E. Sisson and Doris Fischer, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 17, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 13058

A. F. LEVY, Administrator,
Plaintiff and Appellant,

vs.

JOHN E. Sisson and DORIS FISCHER,
Defendants and Appellee.

STATEMENT OF POINTS RELIED ON AND
DESIGNATION OF RECORD

To the Clerk of the Above-Entitled Court:

Plaintiff and appellant herein, relies in particular upon subdivision two (2) of Title 8, Section 47, and all of Section 48 of Title 8, U.S.C.A., and the jurisdiction provided under sub-division One (1) and Two (2) of Title 28, Section 1343. On the ground that the complaint sets forth sufficient well pleaded facts to invoke these laws and maintain an action against the appellees herein. That the only part of the record that is material to this proposition and the appeal herein, for the determination of this question is the complaint less exhibits attached thereto and the "Order Dismissal Action," dated June 7, 1951, and entered June 8, 1951.

Dated at Los Angeles, California, August 22, 1951.

/s/ A. F. LEVY,
Appellant.

Affidavit of Service by Mail attached.

United States
Court of Appeals
For the Ninth Circuit

A. F. LEVY, Administrator,	}
vs.	
JOHN E. SISSON and DORIS FISCHER,	
	<i>Appellants,</i>
	<i>Appellees.</i>

Appellant's Opening Brief

Appeal from the United States District Court for the
Southern District of California
Central Division.

A. F. LEVY,
4314½ Sunset Blvd.
Los Angeles 27, California,
In Propria Persona.

FILED

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United States
Court of Appeals
For the Ninth Circuit

A. F. LEVY, Administrator,	} No. 13058
JOHN E. SISSON and DORIS FISCHER,	

Appellant's Opening Brief

Appeal from the United States District Court for the
Southern District of California
Central Division.

STATEMENT OF FACTS

The verified complaint (p. 3, Ptd. record) states issuable facts tending to establish a cause of action against each and both of the defendants, in the completion of a conspiracy and concert of action to interfere and defeat the due course of justice of judgment creditors et al. represented by the plaintiff administrator therein. In violation of 571-1023-956-730-950 Cal. Probate Code and others too numerous to mention.

In pursuance of said facts which are comparably set forth in Title 8, Sec. 47, subdivision (2) U. S. C. A. together with the liability imposed thereunder of the following section 48 of the said title: Original jurisdiction is imposed upon the District Court under subdivisions one and two of Title 28, Sec. 1343. Review herein is authorized by T. 28-1291.

STATEMENT OF THE CASE

Debased persons deprived the decedent while living, of every right afforded under the Constitution and California laws. Though every effort to claim and retain them were exerted and no method of escape could be found after appeal to the courts fell upon deaf ears; the only relief of self destruction had to be taken by the deceased, who in her will disinherited these persons. They claimed the testatrix was incompetent to dispose by will of the remaining property which by futile effort to misappropriate before, had failed. They looted and devastated nearly all of this remaining property before the question of incompetency could be adjudicated, except the final payment due the deceased as an heir of another estate of which the defendants and appellees are or were representatives and attorneys. And this is the subject of the instant action and appeal.

Fearful that the respondents might join these other conspirators, because these conspirators had prematurely closed the ravaged estate, having filed assign-

ments, in their favor, supposed to be due from pretended heirs of the estate the appellant represents—extraordinary precautions were defeated by the appellees to advise the court of the requirements of 1023 supra requiring distribution to appellant and not to the heirs of the estate. (See Exhibit A, page 1, lines 25-26, also page 4, lines 9-10.) (Exhibit D, page 1, line 6, marked thus ***) (Note “All Items submitted” Exhibit D, page 2, does exclude objection of distribution to heirs.)

Thereafter when action for representatives’ right to distributive share was brought against respondents, so payment to judgment creditors would prevail against the respondents’ co-conspirators as provided by 1021-1023 Probate Code. Knowing full well that the decreed distribution to heirs could never become final the respondents instead of paying the decreed amount as shown by Exhibit B, page 6, to be \$375.98 or, if a lesser amount were claimed then to deposit said lesser amount with the court clerk as provided by law, they filed a demurrer to the complaint, (Exhibit E, page 1) holding that the statutory authority to sue aforesaid does not state facts sufficient to constitute a cause of action, falsely stating it was made in good faith.

While this demurrer was pending and after findings and conclusions were waived by the respondents and the final account settled as shown by four and five stars (thus ****) in Exhibit D, page 1, a mis-

named paper entitled "Petition for instructions," which is likewise shown on page one with six stars showing its denial by the Probate judge which had as its object to vacate the conclusions and settlement just stated, so the funds would be diverted to the respondents for extraordinary fees defeating their co-conspirators as well as the judgment creditors, because the respondents perpetrated a fraud upon the court in having the decree direct payment to the pretended heirs instead of through the regular course of probate administration.

Because of the malicious sustaining of the aforesaid demurrer, appellant sought to avoid this lower court by raising the monetary amount out of its jurisdiction, but again the respondents sought to thwart this through the court clerk insisting that the lower court's permission, which could not be obtained, must first be had. (See Exhibit B, pages 6-7.)

So anxious were the respondents that another malicious ruling might be had against the raised amended complaint which merely increased the monetary claim. On behalf of Doris Fischer a demurrer to the first amended complaint was prematurely filed when it was out of the court's jurisdiction to determine it. (See Exhibit E, page 3, so entitled.)

After needless delay the action was transferred to the higher trial court, and when no action was taken under the requirement of section 591 C. C. P. the instant action began in the U. S. District Court.

ARGUMENT

I.

The "Motion to dismiss and motion for judgment upon the pleadings" is found on pages 14 to 16 with a needless repetition following which is identical, except in respondent's name. Both will be treated as one. Eight requests for dismissal are shown. The first one that "complaint fails to state a claim upon which relief can be granted." They admit the facts stated in the complaint are true, so require no denial, by answer. The object of the complaint is to elicit an answer. To find out why these respondents and both of them, conspired with the conspirators of another estate to effect the payment of \$375.98 to the heirs of this other estate in which their co-conspirators would share and thereby defeat the judgment creditor claims pending against this other estate which the appellant herein represents. Why they obtained a decree of distribution, that ignores and leaves unsubmitted a warning and objection that a deceased heir's distributive share as provided by law aforesaid goes to the deceased heir's representative and not to the heirs of the deceased heir. Why before or after the appellant had begun suit as authorized by statute aforesaid against the appellee as defendant below the decreed distributive share of the deceased heir or no part thereof was tendered into court as required. (1025 C. C. P.) Where one bases an action upon statutory authority aforesaid, he states the greatest right to recovery the law can conceive.

(*San Francisco v. Spring Valley Water Co.*, 63 Cal. 528-9.) Then why did the appellees file repeated demurrers as set out in the statement of the case herein? Appellant relying upon the special statutory right to sue and having alleged and complied with all the conditions imposed by statute, the appellees seek to have it dismissed on the ground that it appears boldly from the face of the complaint that there is not the slightest grounds for recovery admitting that all the facts tending to state a cause of action against them is true.

It requires no citation of authority to say that before this court can sustain a lower court judgment order, the lower court must have jurisdiction of the subject matter, jurisdiction of the person or parties and must be based upon a sufficient complaint or other paper that institutes the action or proceeding. The omission of any one of these is a complete defense and fatal to the entire cause. Therefore if any one is lacking, it is not of the slightest consequence if any of the others, do or do not exist. Such fundamental questions are never waived and may be brought for the first time in the highest court in the land. So if objections to part of a claim are first made and not met then any time thereafter objection to the entire complaint is in order. Then, as in the remaining objections of the motion to dismiss, etc., objections to part of the complaint cannot be entertained where it is alleged that the entire complaint is insufficient and the court should compel the objector to go to trial upon the truly stated subject matter therein contained.

A mere inspection of the remaining seven objections, in addition attacks jurisdiction of the subject matter and parties in a manner that violates both Federal laws and rules of procedure and the fundamental rules of pleading, but for all practical purposes this is as well as though they had been well and properly pleaded since likewise they are matters that can not be considered if no claim for relief can be granted.

II.

When these matters came on for hearing, it became the duty of the trial judge to determine if the facts in the complaint were sufficient to invoke the court's jurisdiction or consideration as believed by the complainant as set out in paragraph III, page 4, printed record. He must do this without regard to the appellees' motion to dismiss, because if the facts stated in the complaint are insufficient to invoke the court's jurisdiction under the law relied upon in paragraph III aforesaid, there is nothing the opposing party might say that would do so. Every presumption on appeal is for the regularity of the proceedings below, so as we turn to the "Order Dismissing Action," page 19, printed record, we proceed to find on page 20, (1) That said complaint fails to state a claim, etc. Without reading further we know the court must have held that facts stated in complaint conferred and invoked the court's jurisdiction under the Constitution and Laws of the United States as set forth in said paragraph III of the complaint. However, as afore-

said—jurisdiction of the subject matter, is always open to this or any other court, for review and reversal if erroneous. Accordingly the court went into the merits of the “Motion to Dismiss” and if appeared certain that the appellees’ first objection “because the complaint fails to state a claim against the defendants upon which relief can be granted,” was correct. This being a complete defense as aforesaid, any further findings would constitute needless surplusage. But the court did not so find. As just stated it found instead: “That complaint fails to state a claim,” which must be reversed since a claim of \$5,412.16 is stated both in the opening and closing page of the complaint. (pp. 3-13 printed brief.) Having already determined that a right of action does exist under the amendment of the Constitution as stated in III of the complaint, it is of no consequence as stated in the closing sentence of (1) Court order, “that said action does not arise under any Article of Section of the Constitution of the United States.” The next finding or grounds (2) regarding parties, is likewise very true but it also is of no consequence since no such requirement is authorized or required in this particular action. The remaining matter in this court order is not proper and offers nothing for review and was, as shown, filed the same day as made without submitting it for approval as to form as required by rule 7 of the District Court for Central Division and referred to as “District Court Rules in the Notice of Appeal, page 21, printed record. Again defeating the regular course of law. (*People v. Gilbert*, 25 Cal. (2d) 422.)

III.

Not one relevant case or statute has been cited. In *Allen v. Corsano*, 56 Fed. Supp. 169-171, it says there has been a paucity of judicial interpretations on section 47. Though Allen's complaint was held not to be without color of law, it did not state a claim upon which relief could be granted because he failed to use the extraordinary remedy of mandamus, which is not available to your appellant because of the special statute aforesaid authorizing suit against the executrix and appellee herein.

In short then the only questions raised by this appeal is, (1) If the complaint does not state facts sufficient to constitute a *right* of action within the contemplation of the authority set forth in III of the complaint, then what facts are lacking? (2) Why the complaint fails to state a claim; it being admitted that the action does not arise under any Article or Section of the Constitution of the United States except that the judicial power extends "between a State, or the citizens thereof, and (3), why there must be a diversity of citizenship between the parties plaintiff and defendant before due process or regular course of law can prevail. The provisions of 1331-1332, Title 28, do not apply to Section 1343 herein.

Respectfully submitted,

A. F. LEVY,
In Propria Persona.

Dated at Los Angeles
October 31, 1951.

No. 13058

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. F. LEVY, Administrator,

Appellant,

vs.

JOHN E. SISSON and DORIS FISCHER,

Appellees.

APPELLEES' BRIEF.

JOHN E. SISSON,

210 West Seventh Street,
Los Angeles 14, California,

Appellee Appearing in Propria Persona.

DORIS FISCHER,

1636 North Mariposa Avenue,
Los Angeles 27, California,

Appellee Appearing in Propria Persona.

FILED

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No. 13058

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. F. LEVY, Administrator,

Appellant,

vs.

JOHN E. SISSON and DORIS FISCHER,

Appellees.

APPELLEES' BRIEF.

Statement of Pleadings and Facts.

Appellant, appearing in *propria persona*, filed a complaint labeled "DAMAGES \$5,412.16." Such complaint contains a conglomerate of many allegations in a single cause of action. Such complaint also contained as Exhibits A, B, D and E, none of which were copied into the "Transcript of Record" and same hence is incomplete. Exhibit A was a purported copy of the "Order Settling Fourth and Final Account, Report, Allowance of Statutory and Extraordinary Executrix's Commissions, Allowance of Statutory and Extraordinary Fees to Attorney, Authorization to Abandon Worthless Assets and for Distribution" in the Estate of Mathilde G. Mautner, Deceased, under probate proceedings number 179-836 in the Superior

Court of the State of California in and for the County of Los Angeles. Exhibit B consisted of a letter from John E. Sisson to appellant; answer thereto by appellant; letter of appellant to Doris Fischer; another letter by appellant to Doris Fischer; a series of computations; letter from Wm. F. Schwartz, Commissioner, Los Angeles Municipal Court to appellant; letter of appellant to Presiding Judge of Municipal Court. Exhibit D consists of a purported transcript of the Register of Actions—Mathilde G. Mautner, Deceased; and a purported copy of minutes of Superior Court. Exhibit E consists of a purported copy of a demurrer in case number 994-994 Municipal Court, City of Los Angeles, County of Los Angeles, State of California, entitled “A. F. Levy, Administrator of Estate of Carrie F. Levi, deceased, plaintiff, v. Doris Fischer, Commercial Casualty Insurance Company, and Heirs of the Estate of Mathilde Mautner, Deceased, Defendants”; and a purported copy of demurrer to first amended complaint in the same action.

A motion to dismiss and motion for judgment upon the pleadings was filed by both appellees and same was duly sustained by Justice James E. Carter on the grounds that the complaint failed to state a claim; and that the action did not arise under any Article or Section of the Constitution of the United States; and that no diversity of citizenship is shown or alleged.

Such Judgment of Dismissal Was Proper.

(a) Said Complaint Fails to State a Claim.

The complaint in this action contains no substantial relation of coherent facts and contains only a group of unrelated conclusions, impressions and scurrilous matter.

Under the circumstances where such a complaint fails to state a coherent cause of action or causes of action the same may be dismissed upon application.

See:

Sutton v. Eastern Viaui Co. (C. C. A., Ill, 1943),
138 F. 2d 959;

Picking v. Pennsylvania Railroad Company (D. C.,
Pa., 1944), 3 F. R. D. 425.

(b) The Amount in Controversy Is Insufficient.

Through many confused statements involved in such complaint, it will be found that the principal amount in controversy is an alleged distribution from an estate in the sum of \$375.98. This is far below the required amount of \$3,000.00 to confer jurisdiction in the United States District Court.

Where the amount in controversy is insufficient, the cause properly should be dismissed.

See:

Topping v. Fry (C. C. A., Ill., 1945), 147 F. 2d
715.

(c) No Federal Question Is Presented.

It would appear from the varied statements in the complaint that basically his complaints relate to disagreement and criticisms of judicial decisions of other courts of competent jurisdiction. The proper remedy in such instances is an appeal from such decisions. Appellant has not shown that he has in any respect or manner proceeded to exhaust his remedies in such proper forum. It is submitted that if appellant claims that his civil rights have been violated it is incumbent upon him first to show diligence and pursuit of the proper legal remedies available to him in the courts of proper jurisdiction. He cannot, without pursuit of any such remedies or procedure, apply to the District Court of the United States simply because he disagrees or challenges the decisions of such other courts.

It is submitted, therefore, that no federal question exists, and where such is the situation, the action should be dismissed.

See:

Scott v. Pennsylvania R. Co. (D. C., Pa., 1949),
8 F. R. D. 548:

Aralac Inc. v. Hat Corp. of America (C. C. A.,
Ill., 1948), 166 F. 2d 286.

(d) There Is No Diversity of Citizenship Presented.

In the first paragraph of his complaint, appellant alleges: "(Plaintiff) Being a resident of said County and State (Los Angeles County, California) and a citizen of the United States as the said named defendants John E. Sisson and Doris Fischer so are also."

Under the circumstances by his own pleading, appellant admits and concedes that appellant and appellees are residents of Los Angeles County, State of California, hence no diversity of citizenship exists to vest the Federal Courts of the United States with jurisdiction.

Where there is no diversity of citizenship and the cause of action rests primarily with the state courts, the court must properly dismiss such action.

See:

Polhemus v. American Medical Ass'n (C. C. A., N. M., 1944), 145 F. 2d 357.

Conclusion.

For the reasons stated, appellees contend that the action of the District Court in dismissing such complaint of appellant was entirely proper, and the judgment of such dismissal must be affirmed, and further, that such appeal be dismissed.

Respectfully submitted,

JOHN E. SISSON,

Appellee Appearing in Propria Persona.

DORIS FISCHER,

Appellee Appearing in Propria Persona.

United States
Court of Appeals
For the Ninth Circuit

A. F. LEVY, Administrator,
Appellant,
 vs.
 JOHN E. S I S S O N and DORIS
 FISCHER,
Appellees.

Appellant's Reply Brief

Appeal from the United States District Court for the
Southern District of California
Central Division

A. F. LEVY,
4314½ Sunset Blvd.
Los Angeles 27, California,
In Propria Persona.

FILED

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United States
Court of Appeals
For the Ninth Circuit

A. F. LEVY, Administrator,

Appellant,

VS.

JOHN E. SISSON and DORIS
FISCHER,

Appellees.

No. 13058

Appellant's Reply Brief

Appeal from the United States District Court for the
Southern District of California
Central Division

REPLY STATEMENTS

I.

Levy, now files his “Appellant’s *reply brief*” (R. B.) replying to “Appellee’s answering brief” (A. B.) in response to “Appellant’s *Opening Brief*” (O. B.) and Clerk’s printed “*Transcript of Record*” (T. R.) as distinguished from the Original *certified Record* (C. R.) from which it was made. In pursuance of (T. R. p. 24) and *ninth circuit court rules* (9th C. R. Rule 6).

In transcribing paragraph III from (T. R. p. 4) to page 24 and again (O. B. p. 2, line 2) section 43 was inadvertently omitted. This section in addition to the last paragraph of Sub. 2 of 47 supra, prohibits "*every person*" as distinguished from "two or more persons" from subjecting or "causes to be subjected, and again from "conspire for the purpose of . . . defeating . . . the due course of justice" without regard as (or not) of a color of any statute etc." While 1343 supra appears to be a combination of both.

Paragraph III is controlling as aforesaid and constitutes the last paragraph of "Statement of Facts." (O. B. p. 2.) Page 1 therein covers the pleaded facts, answered by "Statement of Pleadings and Facts" (A. B. pp. 1-2) and admitting with Appellant that the jurisdictional facts (O. B. p. 2) are correct, subject to this court's approval. What they say, (A. B. p. 4 c.) makes it uncertain. There they mention "civil rights" and acknowledge "Not one revelant case or statute has been cited" (O. B. p. 9, L. 1) by failing to deny it and then cite in mock fashion the same cases they cited below, all of which arise under the general laws, without any relation to the special civil right statutes aforesaid. Filed twice before. (C. R. Filed 4/28/51 and 5/22/51 with Motion to dismiss.)

II.

By not denying they admit that 1331 (amount involved) and 1332 (citizen diversity) (O. B. p. 9, last line) are general statutes not applicable to 1343. Otherwise there would be no object in filing an opening brief. Scott case: premature starting train (1331-2) has nothing about 1343. (See footnote 5-6 under 1343 and *Bottone v. Lindley*, 170 Fed. 2nd, 705, Syl. 2.) Arlac case: No Federal question. Plaintiff therein had no legal interest in the judicial relief sought. Civil rights not involved. Since they deny nothing in their "Statement of Pleadings and Facts," they admit everything, (pleaded and jurisdictional facts) in appellants "Statement of Facts" is true and that they violated all the 5 code sections et al. Then they bring in new matter instead, that makes little if any sense.

III.

After admitting their misuse and abuse of the sections they were sworn and paid to uphold they want to belittle and discredit, by saying "Appellant filed a complaint labeled "Damages \$5,412.16." Nobody put any label on it. The original complaint was sent up. It is entitled "Damages" as shown (R. T. p. 3) to furnish the grounds for laying the claim that follows it. Then "complaint contains a conglomerate of many allegations in a single *Cause of Action*." In *Mullen v. Fitzsimmons vs. Connell Dredge and Dock Co.*, 172 Fed. 2nd, 601 (5) c.c.a. 7th, says you can even confound them and that's worse than conglomerating.

Containing a "single cause of action" in any form, is all the law requires.

IV.

Paragraph I (T. R. p. 3) shows "appointment of Administrator." II. Shows defendant's status relating to said administrator. III. Jurisdictional requirements. IV. Inheriting victim tries to escape her oppressors but is forced to return, unto death. V. Oppressors become defeated will contestants, but overpower will opponents, wreck estate, defeating creditors then abandon it. VI. Oppressors through fake heirs, have assigned interest that belongs to judgment creditors, and defendant administratrix joins them. VII. Then enlists aid of civil court judge. VIII. Try to intimidate judgment creditors representative who tries Federal court herein. What's conglomerated?

V.

What's purported copy and hence incomplete? Exhibits are true copies of original court papers, by law made, final conclusive and unanswerable. The evidence of the ultimate facts set out in the complaint, to prove said facts if this court grants a trial. If exhibits contradict the facts in complaint, Appellee brings them up. (9th C. P. 19-6.) Or denies letters if a trial is granted.

VI.

Concluding: (A. B. p. 2) is a needless repetition of the court order dismissing Action, (T. R. p. 19). Elevating the judgship name and changing the middle initial. The omitted part for convenience here says, page 20:

“Said motions having been so granted, and the action dismissed, the Motions for judgment on pleadings, motion for more definite statement, etc., and motion to strike of said defendants were with the consent of said defendants withdrawn.”

The defendants must have an awful “pull” to get into any court with that chicanery, (O. B. p. 8, last sentence) also in violation of F. R. C. P. (54(a)). Prohibits recitals of pleadings. And the Justice? was most fortunate in getting the defendant’s consent. No wonder the judge signed without approval, (p. 8, id.). “No motion for judgment on the pleadings” under rule 12(c) id. until after the pleadings are closed, hence premature. (*Buris v. Stoudt*, 2 F. R. D. 219.) More definite statement is out too, 12(e) id., requires that motion “shall point out the defects complained of and details desired,” and he didn’t do it. (T. R. p. 15 VI.) Rule 12 F. id. provides the Court “may strike *insufficient defense*, redundant, immaterial impertinent or scandalous matter” from any pleading. Every one of his defenses except “claim upon which relief can be granted” are unauthorized “insufficient defenses” so if there was any improper matter in the

complaint he was barred from asserting it. But there is none. Only the defenses provided in 12 B under the 7 subdivisions thereunder are allowable on a motion to dismiss.

VII.

It was the court's duty under Rule 12 H.(2) to dismiss the action on the ground "that the court lacks jurisdiction of the subject matter" in pursuance of paragraph II. of the Defendant's motion to dismiss the action on F.R.C.P. rule 12 H.(2) "that the court lacks jurisdiction of the subject matter" instead of the stupid order that excludes amendments to the Constitution (T. R. 20-1) or read the amendment as though it said: (2nd paragraph) "No state shall deprive any person (of another state) of life, liberty or property, without due process of law, (unless the amount exceeds \$3,000). Then again in (1) where it says: "That said complaint fails to state a claim. (See O. B. 8, Lines 11 to 13.) Instead of the last reference is meant: "Failure to state a legal defense" as provided in F.R.C.P. 12 H.; then said question as the rule provides: "May be made in a latter pleading." The only question therefore is: "Do the facts stated in the complaint invoke the court's jurisdiction under the special civil rights act?" Such incompetency upon the judge and defendant's part, is not so repressible as their audacity in overthrowing the court rules, (which are said to be in the breast of the court) and then refusing to comply with them when brought to

their notice in a noticed hearing. (T. R. p. 21, Lines 10 to end.) See also, (O. B. p. 8, last paragraph).

VIII.

Appellees admit "Statement of the Case" (O. B. pp. 2 to 4) extracted from the ("conglomerated") complaint as provided by (9th C. Rule 20.3). And also "substantial relation of coherent facts," "unrelated conclusions," "impressions and scurrilous matter," "proper remedy and jurisdiction," "exhausting state remedies before application to Federal courts," have already been decided by them. The usual method, is for counsel to submit, statutes, cases *in point*, tenable argument, showing wherein the improper remedy and jurisdiction lies: Why and wherefore state remedies must precede Federal authority; and pointing out wherein lies the incoherent facts, unrelated conclusions, scurrilous matter and defects as the appellant has done, so the reviewing court can render an intelligent opinion. Not in one instance have they done this.

Thousands of gangster lawyers in collusion with gangster judges have and are depriving hundreds of thousands of persons of the right to the use of the courts. Is that what is meant when he says: "Disagreement and criticisms of judicial decisions of other courts of competent jurisdiction. Or does he mean as in the instant case: criticizing the right of throwing the case out of court, so no final judgment can be made to criticize? They know the difference between a judgment and a judgment order dismissing an action, but

all gangster lawyers, in the abusive misuse of the law as a tool for robbery, are very skillful in tautology, chicanery, petifoggery, sophistry, cavilling and rascally practices. They refuse to discuss the only case in point, (O. B. p. 9) cited 56 Fed. Supp. 169 supra.

IX.

THE ALLEN CASE

It would be extremely difficult to draft a complaint for labor performed that "fails to state a claim upon which relief can(not) be granted." Any statement contrary would border on the fringe of absurdity. Justice Corsano, after suit by Allen for refusing to issue process etc. for him, should have moved for dismissal under 12 B. 7. "Failure to join indispensable party." Instead of 12 B. 6. (*id.* less not). Having so failed, Judge Leheay should have denied the motion, requiring Corsano to answer, in which he could in addition have renewed the same motion under 12 H., which if he had done so, (he did not) would require dismissal of Allen's complaint, without prejudice. Thereby giving Allen the opportunity of obtaining the true name of the required defendant conspirator, as required by T. 47 (2) supra "two or more persons." He named a class of state officials, not a person. Therefore Judge Leheay, inadvertently, but needfully, rendered an opinion in a case where his powers to do so were never invoked.

Corsano has shown that his solemn oath is not sacred at all and that, as far as his court is concerned, justice like pork or beans is a commodity, and one may with impunity get anything they want for a price, since his salary is the smallest part of his income. Since every employee owes a certain amount of fidelity to his employer, every person using the courts has a right to believe that a person sworn under oath, (and the least they will settle for) that when an officer is called upon nothing more than to perform a ministerial duty—he will not refuse to do it. When a thing must be done one way and there is no other way to do it, then it ceases to be discretionary any longer. Where one is vested only with ministerial duties, alone, he cannot perform if the statute is not clear as to what his duty is and then must look to the courts for interpretation.

The failure to seek mandamus, is the crucial point of the decision. All of the authorities, (and there are lots of them) agree that the Federal court is the proper place to determine Federal questions, without first exhausting or requiring one to use state courts for this purpose. Where no reason or precedent is shown, the opinion must be accepted with caution as nothing more than to defeat the individual suitor, and cannot be followed by the court below, and may as well to never have been rendered. The cited Corpus Juris text book holds that mandamus is the remedy where a court abuses its discretion or without or in excess of its jurisdiction.

X.

Corsano has no discretion to abuse and though he had plenty jurisdiction he was not without; but he misused it by not using it but abused the law instead of giving effect to it. Courts existing for the correction of errors, are not classed in Corpus Juris or anywhere else with the courts of impeachment. The courts in Delaware are not functioning and most probably mandamus would have been denied Allen no matter how cogent the reasons for its issuance may be. Otherwise Corsano would not have refused to perform in the first instance, or if granted, he would have to disqualify Cardoso who in turn would influence any continuance of the suit to Allen's defeat. As set forth above this is not a hazard that every suitor must expect. Just the contrary is true. If there is any merit in the Constitution, then why not give effect to it in accordance with the laws made in pursuance of it, by the Congress? The Constitution loses its virtue the moment its procurement is impeded by state law requirements or Federal Courts impose such requirements before it can be made available. It cannot function properly in the shadow of chance or hazards.

XI.

If some bonded state official, whose name is ascertainable in concert and conspiracy with Cardoso, and in furtherance of that conspiracy, Cardoso refused to issue process etc., and it was done in the regular performance of their duties under color of law, then Judge

Leheay could not dismiss Allen's complaint, because the Federal Court had jurisdiction of the subject matter. The refusal constituting the overt act. This overt act though obnoxious to the State, is none the less the act of state officers, that are depriving him of the regular or due process of law. And any persons whether they be state officers or not that acted in concert to produce this deprivation are likewise liable, if injury results therefrom.

It has the same effect as though the state had passed a law that prohibited all persons whose name begins with the letter "A" from using the courts for the recovery of a valid claim, thereby denying them the equal protection of the law, which other persons with different names may enjoy. Judge Leheay, by his opinion, appears to be very honest. He admits that he is pioneering in a somewhat unexplored field and though not infallible, he appears to maintain the regular course of law in his court, while the instant case does not.

XII.

Appellee Fischer openly, brazenly and boldly, directly in the face of the admonition of the appellant and the special statute for the protection of estate creditors, that the distributive share shall not be paid to the heirs. Thereupon by practicing fraud upon the court, she obtains a void decree making it payable to the heirs. Any judge, to uphold his own honor and dignity, would gladly vacate such a decree if it were

in his power to do so. Subtly she sought delayed payment until the creditor's representatives complained, at which time she would advise that she already had complied with the terms of the decree though she knew it was void, but valid because her lawyer had falsely said so. The law is not conglomerated. Judge Green, by sustaining the demurrer, joined the conspiracy, together with the administratrix as the second state official acting under color of law in the supposedly or regular course of his duties. Unless the former, appointed and bonded unto the State of California is not deemed to be such.

In the 16th century (1610) during the reign of Elizabeth the first laws were passed to protect creditors. California law requires "notice to creditors" be published, which was not done until six years late and after the entire estate had been devastated, except the \$375.98 aforesaid. Many laws have been passed since then and the records are cluttered up with cases for centuries. The laws of California like those of Delaware have broken down; gangster judges and lawyers have taken over and we have no laws to meet this situation, that the Federal courts will enforce. If the appellant, as administrator, fails to collect the assets of his estate and pay the creditors, then he becomes liable to the creditors for failure to do so. On the other hand if he attempts to do so, all the constituted authorities flout the law and prevent him from doing so. So relief from the Federal court must be the answer, until then the appellees are causing the creditors to be sub-

jected to the continued deprivation of their adjudged property.

CONCLUSION

Our form of government is under attack in foreign countries. If we cannot defend it here how can we defend it there? Lincoln said: "If ever our form of government will be destroyed, it will be from within and not from without." The highest forms of government have always perished, when the judicial branch did not function. Judicial robbery, kidnaping and slavery pervade the entire nation. In Pennsylvania there is a case where both the judicial and executive authorities aid and abet in a most sadistic murder. The Rosenbergs have been sentenced to die for giving away the secret of the atom bomb, and upon their execution Federal Judge Kaufman becomes the world's best known judicial murderer. No one can say that the United States is a country that should be entitled to the exclusive use of such a dangerous weapon, so what are they being punished for? We pass laws trying to prevent persons from overthrowing our form of government through force and violence and yet judicial force and oppression is the only thing our courts will recognize. If you say this to a native American, he is apt to say: "All those judges are alike" but foreigners look at you with awe and amazement and generally reply: "Such things could never happen in my country." Cardosa like Green hide their rottenness in

silence and thereby fall below the standard set by Hitler. We all heard him over the radio in an attempt at least to defend his atrocious behavior. When judges let their honor fall below the little honor we expect to find in thieves, then no wonder we are confronted today with all forms of hoodlum gangsterism. The records of the high state courts in California show the worst forms of law abuse, robbery and fraud, with the Supreme Court acting as a "rubber stamp" of approval. And the appellees suggest the same procedure in the Federal courts. State law provides severe penalties against those who misrepresent court proceedings, but no restrictions have yet been placed on those who speak the truth. The individual has no right in the courts. They exist to do the bidding of the corporations, gangsters and the special interest groups. Sure, I speak reproachfully, I bitterly denounce these gangsters who turn the pride of the gold star mother into shame, and accuse those who oppose them of using scurrilous matter because they speak boldly within the final conclusive and unanswerable record.

Appellant, by the statutory requirement in attempting to perform his duties, is not personally liable for any costs herein. Nor is there any way to impose any liability against the estate which he is attempting to administer. Any court, if it will, can render an opinion to defeat any suitor, but if not based upon law or well reasoning, the Appellees are liable in another action for Appellant's costs herein. The law belongs to the people and the Constitution vests no absolute right in this or

the highest Federal court. If their opinions are with color of law, but not acceptable, Congress can change the law within the Constitution. If without color and Congress refuses to take over, then there is no reason why the communists should not.

Should the court adopt the Appellee's suggestion, then it should be mindful of the immortal Lincoln precept: "Those that deny freedom to others do not deserve the right to claim it for themselves, and under a just God, may not long retain it."

Respectfully submitted,

A. F. LEVY

Estate Administrator.

Dated at Los Angeles, Calif.

Dec. 12th, 1951.

No. 13059

United States
Court of Appeals
For the Ninth Circuit.

CALIFORNIA ELECTRIC POWER COMPANY,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

OCT 22 1951

No. 13059

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Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Los Angeles 12, Calif.

United States District Court for the Southern
District of California, Central Division

Civil Action No. 12210-M

CALIFORNIA ELECTRIC POWER COM-
PANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

The above-named plaintiff in stating its cause of action against the defendant herein, complains and alleges:

I.

That this action arises under Section 1346(b), Title 28, United States Code.

II.

That plaintiff now is and at all times mentioned herein was a corporation organized and existing under and by virtue of the laws of the State of Delaware and duly authorized to do business as a public utility corporation in the State of California.

III.

That at all times mentioned herein plaintiff was the owner of that certain 88 KV electrical transmission line consisting of steel poles, crossarms, wire conductors, braces, attachments and appurtenances which extends from the City of Blythe,

County of Riverside, State of California, to the City of Calipatria, County of Imperial, State of California.

IV.

That on or about March 8, 1950, and at about the hour of 10:05 a.m. certain Navy pilots based at the U. S. Naval Auxiliary Air Station, El Centro, California, were engaged in air to air gunnery exercises over the Chocolate Mountain gunnery range; that said pilots were firing on a Drone target plane (TD2C-1, Navy, 120001) which was radio-controlled and operated by one of said [2*] pilots; that each of said pilots was employed by the United States of America and each was acting within the scope of his office or employment.

V.

That at said time and place defendant, acting through said employees, caused said Drone target plane to strike against and collide with plaintiff's said transmission line at a point approximately five miles east of Niland, California, and trespassed thereon; that as a direct and proximate result of said trespass plaintiff's steel poles Nos. 170, 171, 172 and 173 were caused to split and break, steel pole No. 168 was twisted and bent, and all three wire conductors were brought down; that the reasonable cost to plaintiff to repair the damage to said transmission line was and is the sum of seven thousand three hundred and forty-six dollars and four cents (\$7,346.04); that as a direct and proximate result of said trespass plaintiff was damaged

*Page numbering appearing at foot of page of original Certified Transcript of Record.

in the sum of seven thousand three hundred and forty-six dollars and four cents (\$7,346.04).

For a Second and Separate Cause of Action Plaintiff Alleges:

I.

That reference is made to the allegations contained in paragraphs I, II, III, and IV, of its First Cause of Action which are made a part hereof as fully as though set forth at length herein.

II.

That at said time and place defendant, acting through said employees, negligently and carelessly engaged in said air to air gunnery exercises; that as a direct and proximate result of said negligence and carelessness said Drone target plane was caused to strike against and collide with plaintiff's said transmission line at a point approximately five miles east of Niland, California; that as a direct and proximate result of said negligence and carelessness plaintiff's steel poles Nos. 170, 171, 172, and 173, were caused to split and break, steel pole No. 168 was twisted and bent, and all three conductors were brought down; that the reasonable cost to plaintiff to repair the damage to said transmission line was and is the sum of seven thousand three hundred and forty-six dollars and four cents (\$7,346.04); that as a direct and proximate [3] result of said negligence and carelessness, plaintiff was damaged in the sum of seven thousand three hundred and forty-six dollars and four cents (\$7,346.04).

Wherefore, Plaintiff prays judgment against defendant for seven thousand three hundred and forty-six dollars and four cents (\$7,346.04) and its costs herein, and for such other and further relief as the Court deems proper.

HENRY W. COIL,

H. M. HAMMACK,

DONALD J. CARMAN,

By /s/ DONALD J. CARMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed August 30, 1950. [4]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, and in answer to the Complaint on file herein, admits, denies and alleges as follows:

I.

Admits that this action arises under Section 1346(b) Title 28, United States Code, commonly known as the Federal Tort Claims Act.

II.

Answering Paragraphs II and III of plaintiff's Complaint on file herein, this answering defendant has no knowledge or information sufficient to form a belief as to the truth or falsity of the averments

contained therein, and basing its denial upon said grounds, denies both generally and specifically, each and every allegation contained therein.

III.

Answering Paragraph IV of plaintiff's Complaint on file herein, defendant admits each and every allegation contained therein. [5]

IV.

Answering Paragraph V of plaintiff's Complaint on file herein, this answering defendant denies, both generally and specifically, each and every allegation contained therein, and further denies, both generally and specifically, that plaintiff was damaged in the sum of \$7,346.04 or in any other sum.

Answering Plaintiff's Alleged Second Cause of Action, Defendant, United States of America, Admits, Denies and Alleges as Follows:

I.

Answering Paragraph I of plaintiff's alleged Second Cause of Action, defendant re-adopts all and singular the allegations of its Answer to Paragraphs I, II, III and IV of plaintiff's alleged First Cause of Action which have been re-alleged and re-adopted by reference in Paragraph I of plaintiff's Second Cause of Action, and by such reference herein incorporates the admissions and denials with the same force and effect as if they were set forth herein and at length repeated.

II.

Answering Paragraph II of plaintiff's alleged Second Cause of Action, defendant denies, both generally and specifically, that any of its agents, servants and/or employees negligently and/or carelessly engaged in air gunnery exercises, and further denies that as a direct and proximate result of any negligence and/or carelessness on the part of said agents, servants and/or employees, a target plane was caused to strike against and collide with plaintiff's transmission line. Defendant further denies, both generally and specifically, that as a direct and proximate result of any negligence and/or carelessness on the part of agents, servants and/or employees of the defendant, plaintiff's steel poles were caused to split, break, twist and bend. Defendant further denies, both generally and specifically, that the cost to plaintiff to repair the damage allegedly caused by defendant or any of its agents, servants and/or employees was in the sum of \$7,346.04 or any other sum, and that plaintiff [6] was damaged in said sum or any other sum.

Wherefore, defendant prays judgment as follows:

1. That plaintiff's Complaint on file herein be dismissed.
2. That it have its costs of action incurred herein, and

3. For such other and further relief as the Court may deem just and proper in the premises.

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

REUBEN ROSENSWEIG,
Assistant U. S. Attorney;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney;
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed April 3, 1951 [7]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on regularly for trial on June 12, 1951, before the Court sitting without a jury, Henry W. Coil, H. M. Hammack and Donald J. Carman, by Donald J. Carman, appearing for plaintiff California Electric Power Company, a corporation, and Reuben Rosensweig, Assistant United States Attorney, acting on behalf of Ernest A. Tolin, United States Attorney, appearing for defendant United States of America, and evi-

dence both oral and documentary having been introduced and the cause submitted for decision and the Court have delivered oral opinion from the bench, the Court now makes its Findings of Fact as follows:

Findings of Fact

I.

That it is true that this action arises under and is brought pursuant to the provisions of Title 28, Section 1346(b) commonly referred to as the Federal Tort Claims Act.

II.

That it is true that plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is [9] duly authorized to do business in the State of California as a public utility corporation.

III.

That it is true that plaintiff was the owner of that certain 88 KV electric transmission line consisting of steel poles, cross-arms, wire conductors, braces, attachments and appurtenances which extend from the City of Blythe, County of Riverside, State of California to the City of Calipatria, County of Imperial, State of California.

IV.

That it is true that on March 8, 1950, at about the hour of 10:05 a.m., United States Navy pilots Lt. jg. Claude M. Stephenson, Lt. Burton E. Smith and John L. Culbert were engaged in air to air gunnery

exercises over the Chocolate Mountain Gunnery Range, and that said pilots were members of a squadron, some of which were firing on a drone target plane, which drone target plane was radio-controlled and operated and under the exclusive direction and control of said agents, servants and/or employees of the defendant United States of America. It is true that each of the pilots engaged in said air to air gunnery exercises were employed by the defendant United States of America, and each were acting within the scope and duty of their office or employment.

V.

That it is true that the said drone target plane collided with plaintiff's transmission line at a point approximately five miles east of Niland, California, but that it is untrue that defendant or any of its agents, servants and/or employees trespassed thereon. That it is further untrue that as a direct and proximate result of any trespass committed by defendant or any of its agents, servants and/or employees, plaintiff's steel poles and electric transmission lines were damaged, wrecked, twisted or broken..

VI.

That it is true that the reasonable costs to plaintiff to repair the damage to said transmission line and steel poles was the sum of \$7,330.75, but that it is untrue that as a direct and proximate result of any trespass on the part of the defendant or any of its agents, servants and/or employees, plaintiff [10] was damaged in said sum or any other sum.

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That it is true that plaintiff was the owner of that certain 88 KV electric transmission line consisting of steel poles, cross-arms, wire conductors, braces, attachments and appurtenances which extend from the City of Blythe, County of Riverside, State of California to the City of Calipatria, County of Imperial, State of California.

IV.

That it is true that on March 8, 1950, at about the hour of 10:05 a.m., United States Navy pilots Lt. jg. Claude M. Stephenson, Lt. Burton E. Smith and John L. Culbert were engaged in air to air gunnery

exercises over the Chocolate Mountain Gunnery Range, and that said pilots were members of a squadron, some of which were firing on a drone target plane, which drone target plane was radio-controlled and operated and under the exclusive direction and control of said agents, servants and/or employees of the defendant United States of America. It is true that each of the pilots engaged in said air to air gunnery exercises were employed by the defendant United States of America, and each were acting within the scope and duty of their office or employment.

V.

That it is true that the said drone target plane collided with plaintiff's transmission line at a point approximately five miles east of Niland, California, but that it is untrue that defendant or any of its agents, servants and/or employees trespassed thereon. That it is further untrue that as a direct and proximate result of any trespass committed by defendant or any of its agents, servants and/or employees, plaintiff's steel poles and electric transmission lines were damaged, wrecked, twisted or broken..

VI.

That it is true that the reasonable costs to plaintiff to repair the damage to said transmission line and steel poles was the sum of \$7,330.75, but that it is untrue that as a direct and proximate result of any trespass on the part of the defendant or any of its agents, servants and/or employees, plaintiff [10] was damaged in said sum or any other sum.

Findings of Fact on Second Cause of Action

I.

Defendant herewith repeats, readopts and realleges each and every paragraph of the Findings of Fact to plaintiff's First Cause of Action, and by such reference incorporates in the same herein and makes the same a part hereof as though herein set forth in full as the Findings of Fact to Paragraph I of plaintiff's alleged Second Cause of Action.

II.

That it is untrue that on March 8, 1950, the defendant, acting through its agents, servants and/or employees, negligently and carelessly engaged in air to air gunnery exercises; that it is untrue that as a direct and proximate result of any negligence or carelessness on the part of defendant or any of its agents, servants and/or employees its drone target plane was caused to strike against and collide with plaintiff's transmission line and steel poles; that it is untrue that as a direct and proximate result of any negligence or carelessness on the part of defendant or any of its agents, servants and/or employees, plaintiff's transmission line and steel poles were damaged, wrecked, twisted or broken.

III.

That it is true that the reasonable cost to plaintiff to repair the damage to said transmission line and steel poles was in the sum of \$7,330.75, but that it is untrue that as a direct and proximate result of any negligence or carelessness on the part of defend-

ant or any of its agents, servants or employees plaintiff was damaged in said sum or any other sum.

Conclusions of Law

And, as Conclusions of Law, from the foregoing facts, the Court finds:

I.

That this Honorable Court has jurisdiction to hear and determine the within matter. [11]

II.

That the doctrine of *res ipsa loquitur* applies in this case, but that the defendant has overcome any presumption or inference of carelessness or negligence created by said doctrine.

III.

That plaintiff take nothing by its Complaint on file herein.

Judgment is hereby ordered to be entered accordingly without any costs.

Dated: June 28th, 1951.

/s/ PAUL J. McCORMICK,
United States District Judge.

Approved as to form and substance:

COIL, HAMMACK and
CARMAN,

By
Attorneys for Plaintiff.

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING, and

REUBEN ROSENSWEIG,
Assistant U. S. Attorneys;

By /s/ REUBEN ROSENSWEIG,
Attorneys for Defendant.

[Endorsed]: Filed June 28, 1951. [12]

In the United States District Court in and for the
Southern District of California, Central Division

No. 12210-M Civil

CALIFORNIA ELECTRIC POWER COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 12th day of June, 1951, before the Court sitting without a jury, Henry W. Coil, H. M. Hammack and Donald J. Carman, by Donald J. Carman, appearing for plaintiff, and Reuben Rosensweig, Assistant United States Attorney, acting on behalf of Ernest A. Tolin, United States Attorney, appearing

for defendant United States of America, and evidence both oral and documentary having been introduced, and the cause submitted for decision, and the Court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and being fully advised in the premises;

Wherefore, by reason of the law the oral opinion and the Findings of Fact as aforesaid, it is Ordered, Adjudged and Decreed that defendant have judgment herein without costs.

Done in open Court this 28th day of June, 1951.

/s/ PAUL J. McCORMICK,
United States District Judge.

Presented by:

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney.

Approved as to form:

COIL, HAMMACK and
CARMAN,

By /s/ DONALD J. CARMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed June 28, 1951. [14]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that California Electric Power Company, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 28, 1951.

HENRY W. COIL,

H. M. HAMMACK,

DONALD J. CARMAN,

By /s/ DONALD J. CARMAN,
Attorneys for Appellant.

[Endorsed]: Filed July 18, 1951. [15]

United States District Court for the Southern
District of California, Central Division

No. 12210-CM

CALIFORNIA ELECTRIC POWER COM-
PANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT ON APPEAL

June 12, 1951

Before: Hon. Paul J. McCormick, Chief Judge.

Appearances:

For the Plaintiff:

HENRY W. COIL,
H. M. HAMMACK, and
DONALD J. CARMAN, By
DONALD J. CARMAN.

For the United States of America:

ERNEST A. TOLIN,
U. S. Attorney; By
REUBEN ROSENSWEIG,
Assistant U. S. Attorney.

June 12, 1951

The Court: Call the case, Mr. Clerk.

* * *

Mr. Rosensweig: The Government is ready, your Honor.

Mr. Carman: Plaintiff is ready, your Honor.

The Court: Proceed, gentlemen.

Mr. Carman: May it please the Court, this is an action arising under the Federal Tort Claims Act. It developed at 10:05 in the morning of March 8, 1950. A radio-controlled Navy target plane crashed into the California Electric Power Company's 88 KV electric pole transmission line which extends from Blythe, California, to Calipatria, California. The accident occurred at a point 20 miles northeast of Calipatria and about 45 miles southwest of Blythe. As a result of the crash four of California Electric Power Company's steel poles were broken, one was bent, and all three wire conductors were brought down. Immediately prior to the accident certain Navy pilots were engaged in air-to-air gunnery exercises over the Chocolate Mountain Gunnery Range, and were firing upon the target plane. I understand that the power line rights are within the confines of the Chocolate Mountains although I don't know the exact boundaries of that range.

The Court: I wonder if we can have some stipulation on that phase of it?

Mr. Rosensweig: We have such a stipulation

which we intend to read into the record after counsel has finished [2*] with his opening statement.

The Court: Very well, proceed, Mr. Carman.

Mr. Carman: This target plane was operated by and its flight was directed by Navy pilots that were engaged in the exercise. Plaintiff's complaint alleges the pilots were employed by the Government, were acting within the scope of their employment, and in two counts alleges that allegedly they caused the plane to crash into the power lines and alternately, that they caused it to trespass upon plaintiff's power lines.

The Court: On this question of trespass, we have had occasion to examine that some years ago in connection with the installation of the Lockheed Air Terminal. How are you going to prove that question of trespass?

Mr. Carman: Well, your Honor, we, of course, will rely on the doctrine of liability with fault, under the theory that the defendant here was engaged in ultra hazardous activities.

The Court: I suppose all these war activities are extra hazardous, aren't they?

Mr. Carman: Particularly when they take aloft a controlled plane and fire upon it, it seems they are engaged in an extra hazardous activity.

The Court: This was a drone plane. In that Lockheed case, it went to the Supreme Court, and I think the matter of [3] trespass was ruled out of the phase pretty well. There was a dairy farm and there were a lot of milk cows, and these transports

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

were coming in and out, and the aviation soon frightened these cows and caused a tremendous loss to the dairies out there. That was also a great hazard to the dairy workers and they sought to recover on the theory of trespass.

Mr. Carman: That was, I suppose, an operation by conventional-type aircraft in that the pilot guided it, and probably is a little different situation.

The Court: That is true. It may be.

Mr. Carman: The defendant's Answer admits the pilots were employed by the defendant and were acting within the scope of their employment, admits that they were engaged in aerial gunnery exercise at about 10:05 in the morning of March 8th, over the Chocolate Mountain Gunnery Range, that they were firing upon the target plane, and that the target plane was controlled and operated by the Navy pilot. The Answer denies all of the allegations of the Complaint. Mr Rosensweig and I have talked over certain stipulations we would like to make now, in order to simplify the issues, if we may. I will read the stipulation:

It is hereby stipulated by the above-named defendant by and through its counsel, as follows: first, that the California Electric Power Company is a corporation organized and existing under the laws of the State of Delaware, [4] and duly authorized to do business as a public utility company in the state of California.

Mr. Rosensweig: So stipulated, your Honor.

Mr. Carman: Second, March 8, 1950, California Electric Power Company was the owner and posses-

sor of that certain 88 KV electric transmission line extended from Calipatria, California, to Blythe, California.

Mr. Rosensweig: So stipulated.

Mr. Carman: Third, that at about 10:05 a.m., March 8, 1950, a Navy drone target plane, TD2C-1, Navy, 120001 crashed into said transmission line.

Mr. Rosensweig: So stipulated, your Honor.

Mr. Carman: Fourth, that as a result of said crash steel poles No. 170, 171, 172, and 173 were caused to split and break; steel pole No. 168 was twisted and bent, and all three conductors were brought down.

Mr. Rosensweig: So stipulated, your Honor, and I think it can be said we likewise stipulate to the fact that steel poles 170, 171, and 172, and 173 and 168 are located within the area generally referred to as the Chocolate Mountain Gunnery Range.

Mr. Carman: So stipulated.

The Court: Is there any stipulation or is there any agreement, assuming that there is liability as to the damage?

Mr. Carman: As to the amount of damages, your Honor? [5]

The Court: Yes.

Mr. Rosensweig: I am sorry, your Honor, I would be unable to stipulate to those particular things.

The Court: Are you going to raise an issue there?

Mr. Rosensweig: As to the amount of damages?

The Court: Yes.

Mr. Rosensweig: We would raise the issue for this particular reason: in discussion with counsel concerning the amount of damages we discussed many phases of damages that were caused because of the loss of circuits to subscribers to the electric power of the California Electric Power Company. We think that those damages are somewhat in the field of speculation.

Mr. Carman: Plaintiff is not making any claim for those damages.

The Court: Those would be consequential, wouldn't they?

Mr. Rosensweig: I think they would.

The Court: Probably you think so.

Mr. Carman: Certainly. We are claiming no damages for interruption of service at all, your Honor. We are simply claiming damages for the repair of the damage done to our power line.

Mr. Rosensweig: I think there will be no opposition to the testimony. I don't think the testimony of the individual who has knowledge of the amount of damage would be objectionable, [6] testimony as to his estimate; but I am unable, your Honor, to stipulate to the amount.

The Court: What I want to know is the length of the trial. That is why I am asking these questions. If you are going to introduce a lot of experts as against their experts it is going to take some time to develop that.

Mr. Rosensweig: No, your Honor, we don't expect to introduce expert testimony as to the amount of damage. I think individuals working for and

employed by the electric power company are in the best position to know of the damages here. We do not propose to offer any evidence in opposition to that testimony.

The Court: I see. Very well, gentlemen. I think I understand the issues now.

Mr. Carman: Your Honor, as I see the case now, the only issue involved is the amount of damage and, of course, the legal liability for the damage. I don't know if it is proper, but I would like to proceed to put on testimony as to the amount of damage and then, maybe, have a short argument on the law as to the legal liability of the damages.

Mr. Rosensweig: No objection.

The Court: Very well.

Mr. Carman: May I call Mr. Sheppeard, [7] please.

EDGAR L. SHEPPEARD

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Carman:

Q. What is your position with California Electric Power Company?

A. I am assistant auditor.

Q. How long have you been employed by the company?

A. I have been employed by the company about 23 years.

Q. Do your duties as assistant auditor include

(Testimony of Edgar L. Sheppeard.)

among other things supervision over the preparation of statements of charges in those cases where third parties enter the company's property?

A. They do.

Q. Was the statement of charges originally submitted to the defendant in this case prepared under your supervision and control? A. It was.

Q. Is the amount of that bill correct?

A. Yes, sir.

Q. Mr. Sheppeard, I am asking you about the original bill that was submitted to the defendant.

A. There has been a slight change upon the original [8] bill.

Q. In other words, there was an error in that original bill? A. Yes, sir.

Q. In what respect was that bill in error?

A. The bill was in error in some charges for the equipment expense. The information originally received in our office was later proved to be in error when the final forms were submitted from the field.

Q. How large was that error?

A. Well, it's very minor, amounted to about \$15.29.

Q. Do you have a revised bill with you?

A. I do.

Q. Was it prepared under your general supervision and control? A. Yes, sir.

Q. Did you personally check the revised bill?

A. I have.

Q. Is the amount thereof correct and reasonable? A. I think so.

(Testimony of Edgar L. Sheppeard.)

Q. Do you have with you the original timecards, material requisition slips, mileage slips and other records from which the revised bill was prepared?

A. Yes, sir.

Q. I wonder if I could have those, Mr. Sheppeard. [9]

A. I have them all there together.

Mr. Carman: Your Honor, I would like to offer the revised bill and supporting documents in evidence, and I have a copy of the same here and request I be allowed to withdraw the originals.

The Court: So received and so understood; Plaintiff's Exhibit 1.

Mr. Carman: Do you have any questions on those, Mr. Rosensweig?

Cross-Examination

By Mr. Rosensweig:

Q. Mr. Sheppeard, the original amount of money prayed for in the plaintiff's Complaint was \$7346.04, and this figure of \$7330.75 is the revised figure, is it not? A. Yes, sir.

Q. That appears upon plaintiff's exhibit just offered? A. Yes, sir.

Q. That figure was arrived at through computations and mathematical computations made under your own direction and control? A. Yes, sir.

Mr. Rosensweig: I have no further questions.

The Court: Mr. Sheppeard, the material as distinguished from the labor, that was based on a replacement value, was it? [10]

(Testimony of Edgar L. Sheppeard.)

The Witness: That was based upon our current cost.

The Court: Current cost?

The Witness: Yes, sir.

The Court: I notice the item here says "Cost of removal and replacement of property damage."

The Witness: Yes, sir, that is merely a term of removing the damaged portions of the sector and putting in the new portions of the sector.

The Court: But the aggregate amount stated here, \$7330.75, with respect to the material, the physical material, was based upon a cost value?

The Witness: The present day cost, yes, sir; that is the cost of new material placed into the—used to repair the line.

The Court: This exhibit appears to be dated May 1, 1951.

The Witness: Yes, sir.

The Court: Was there any variance between the cost of the materials at the time of the destruction of them and May 1, 1951?

The Witness: Well, very little; there might have been some slight change.

The Court: How about the labor?

The Witness: There was no change in the cost of our labor at that time. Some of this work, however, was done by the Imperial Irrigation District. We do not know whether [11] there was any change in the cost of their labor during that period.

The Court: I see you have it listed as one of the items of miscellaneous expense.

(Testimony of Edgar L. Sheppeard.)

The Witness: Yes.

The Court: That item "Supervision and General Overhead, \$891.03," what goes into that item to make it up?

The Witness: That is the general supervision of the construction department and of the general supervision of the company. All of our costs I feel have to stand a portion of our general supervision expense.

The Court: That is really laborer's services?

The Witness: Yes.

The Court: I mean as distinguished from physical materials.

The Witness: That is correct.

The Court: That is all.

(Witness excused.)

Mr. Carman: Plaintiff rests, your Honor.

Mr. Rosensweig: Under the circumstances, your Honor, the Government will move to dismiss plaintiff's Complaint in the action on the grounds that they have failed to establish any negligence on the part of any agent, servant, and/or employee acting within the scope of his employment, as required under the provisions of the Tort Claims Act, [12] which specifically states that the Government shall be liable for the negligent acts of its agents acting only within the scope and duty of their employment. There has been no evidence introduced here as to how the accident occurred, what the cause of the accident was, whether there was any negligence on

the part of Government agents and/or its employees. There has been no evidence as to whether or not there has been any trespass, or any allegations or any evidence to support any of the allegations made in the plaintiff's Complaint. As counsel stated in his opening statement he has plead negligence in general terms, in one cause of action, by stating that this damage was caused as a direct and proximate result of the negligence of the agents, servants, and/or employees of the Government. In the second cause of action he alleges the same damage, of course, but for trespass.

I submit, your Honor, that having failed to introduce any evidence as to the facts concerning the happening of the accident the Court could only by inference indicate that because this accident did happen there was negligence on the part of the defendant, and I believe as a result of it plaintiff is seeking to establish the rule of *res ipsa loquitur*. I submit, your Honor, *res ipsa loquitur* does not apply in a case involving an airplane that is not in the business of passenger transportation, or commercial airlines, or airlines of some nature or description, in the transportation [13] business. The ultra hazardous activities which counsel had referred to in his opening statement I am sure would be borne out—there are not many cases on the subject, that is, I know of no case involving a situation such as this where the doctrine has been sought to apply or has been applied. In cases where the doctrine of *res ipsa loquitur* has applied it has involved the crashing of airplanes which are in business of

passenger transportation. I do not believe there is any case in the country which applies that particular rule in cases where the airplanes are not involved in the business of passenger transportation.

Under the present state of the case, your Honor, I think the best that can be said about it is this: that the Government was involved in air gunnery exercises, it does not deny it carried on air gunnery practice at the time in question; it does not deny that the men involved in the gunnery practice were agents, servants, and/or employees of the Government; it does not deny that the drone plane did crash into the power line. It does deny any negligence on the part of any of its agents, servants and/or employees caused that plane to crash into the power line or to crash into the Chocolate Mountain Gunnery Range. The best that can be said of the case at the present moment is that damage had been inflicted by an instrumentality of the defendant, but under the state of the case at the present time it can [14] only be said to be unintentional injury. There is no showing of negligence in the state of the plaintiff's present case, and it certainly cannot be said that if there is intentional injury inflicted upon a particular given party, the California Electric Power Company, or any other party, can it be said the plaintiff would be entitled to recover under the Federal Tort Claims Act, because that Act, your Honor, as you know, is a broad waiver of Government immunity from suit. That is, the general rule they have furthered from time immemorial is that the sovereign is free from liability. When the Act

was passed it surrendered sovereign immunity, and the Tort Claims Act, as already said, is a broad surrender of the sovereignability. But the Tort Claims Act says the Government shall be liable only where its agents, servants and/or employees are guilty of negligence, and if we assume for a moment that this was an accident that occurred, and undoubtedly a very unfortunate accident occurred, and possibly it can be said it was fortunate in this respect, that it did not happen in a populated area, or anything of that sort, but, nevertheless, it is an unfortunate situation that this damage was inflicted by an instrumentality of the Government. But because the accident did happen is no indication, nor is there any sign of any nature or description in the state of the case at the present time, that the Government or any of its agents, servants and/or employees [15] had been negligent. I do not believe the Court under the circumstances can infer, just because of the happening of that particular accident, and even if this was and can be placed in the category of being an ultra hazardous activity, which I doubt under the cases, that the Government could be liable under the Tort Claims Act, because there has been no showing whatever of negligence of any nature or description, and because of those reasons, your Honor, and I could go on for some period of time discussing the technical aspects of the case, and I might refer your Honor to the case of——

The Court: We had no pre-trial in this case at all, did we?

Mr. Carman: That is right, sir.

Mr. Rosensweig: There presently is, your Honor, a case entitled P. A. Kessinger and others, or it would be: United States of America, appellant, against P. A. Kessinger, being a case in the United States Court of Appeals, Tenth Circuit, 4229, in which briefs have already been filed by both the appellant and the appellee, which is a case almost directly on all four, so far as this particular case is concerned. There, likewise, a drone plane was involved, and there, likewise, the original cause was based upon the theory of trespass and, likewise, upon the theory of negligence, and I understand from information I have received from the Attorney General that case has already been argued before the [16] Tenth Circuit and it sets forth very fully and very amply the arguments that I have been making here, your Honor, that neither does the rule of *res ipsa loquitur* apply in cases of this character, nor does the theory of trespass apply, or any of the other matters of law that can be applied here in a case of this sort. When the Court of Appeals might render a decision in the case I am unable to say, your Honor. I imagine they are as up on their cases as our Ninth Circuit is, and it should not be too long before a decision is rendered in the case, although I will say this, in the case involved in the Tenth Circuit, it occurred in Kansas, and I believe the law of Kansas and the law of California is very similar, and so far as the case being won in this district, it certainly would apply on the basic rules established in that case, would definitely

apply. For those reasons, your Honor, I move the plaintiff's Complaint be dismissed.

The Court: Before ruling I just wanted to inquire, Mr. Carman, whether you had overlooked the fact that you haven't introduced either the interrogatories or the response to the interrogatories? Did you do that intentionally or did you overlook it?

Mr. Carman: No, your Honor, those were filed with the Court and I thought the stipulation we presented took care of the matter presented in those interrogatories.

Mr. Rosensweig: Yes, the stipulation entered into, [17] your Honor, would indicate very definitely the various things gone into in the interrogatories.

The Court: And you both agree that is the situation?

Mr. Rosensweig: Yes, your Honor.

The Court: I think on the motion to dismiss without prejudice—the Court is not inclined to indicate with precision its ideas on this because it is novel; it presents, like everything else these days, a new situation. There is a good deal to be said, however, upon the fact that while these preparatory activities to an act of potential warfare are extra hazardous, this Tort Claims Act, in my opinion, leaves in these old doctrines concerning negligence, the doctrine of *res ipsa loquitur*, the doctrine of shifting the burden in a case, the doctrine of presumptive evidence, that an accident which occurs out of the realm of normalcy calls upon the Tort

feasor to act for the—to overbalance the inference that arises because of an accident. Of course, this war situation brings in many new aspects, the training of men for military purposes and, particularly at this time, when there is an emergency which has developed into a shooting war, although, perhaps not classified in that way by some people, it brings in new theories which must be explored judicially, in order that the Tort Claims Act can be properly interpreted.

I think at this time the Court is clearly of [18] the mind that the case should go forward and at least that there is sufficient showing to permit the interpretation of the doctrine of *res ipsa loquitur*.

Mr. Rosensweig: If I may make one more short point, your Honor?

The Court: Yes.

Mr. Rosensweig: We spoke of the doctrine of ultra hazardous activities. That is a rather broad statement. I think that the ultra hazardous activity theory is generally referred to as liability-without-fault theory. Certainly it can be said that if this accident was one that occurred without fault or without negligence it would fall within that category of liability-without-fault, and if it can be said that this is an accident that occurred without the fault of any agent, servant and/or employee of the Government——

The Court: You mean an inevitable accident?

Mr. Rosensweig: Well, so far as we are individually concerned, yes, your Honor. It is one of

those things that happened without the fault of any agent, servant and/or employee of the Government.

The Court: Of course it happened.

I think the reasoning upon which a ruling at this time can be predicated is this: The instrumentalities must be presumed to be functioning normally, the transmission lines, that the structure itself was placed in position under [19] normal engineering and scientific processes, that it was in terrain which was remote, not populous, and that it was licensed by the appropriate political authorities to be placed there. There is no evidence, of course, as to how long it was there, but it was there at the time of the accident. Ordinarily, unless there was some obstacle that contacted with those instrumentalities there would not have been any outside force applied. There might have been some internal force because of aeronautics, or some disturbance of the scientific part of the apparatus, but there would have been no outside, exterior force, unless it be lightning and there is no evidence there was lightning; the property was destroyed.

The Tort Claims Act says that the same rule applies to the Government, now, as applies to the individual, that if there be negligence——

Mr. Rosensweig: Within a clear set of circumstances, your Honor.

The Court: Yes.

Mr. Rosensweig: That there must be some negligence on the part of some agent, servant and/or employee of the Government within the scope of its duty or employment.

The Court: There isn't any evidence of negligence on the part of any agent, servant and/or employee of the Government per se, because those are excluded by the Tort Claims Act. [20]

Mr. Rosensweig: That is correct.

The Court: The performance of a duty of a sailor or airman——

Mr. Rosensweig: There are some 12 specified exceptions, your Honor.

The Court: Yes; none of those are involved here, but there was a destruction of this property, from the interrogatories in the stipulation it now appears that there was a drone airplane there at which target practice was being directed. From those, what is the reasonable inference? There are two inferences, perhaps. One is the one that you argue, that there has not been any proof of negligence. The other is that because of the instrumentality itself when operated normally and according to a proved scientific and mechanical principle, it wouldn't have caused this difficulty.

Well, I think I shall adopt the inference at this time, subject to review later if the evidence warrants, that the theory of *res ipsa loquitur* is applicable, and the motion will be denied accordingly, without prejudice.

Mr. Rosensweig: Thank you.

(A short recess was taken.)

The Court: Proceed, gentlemen.

Defense

Mr. Rosensweig: Officer Culbert, will you take the [21] stand, please.

JOHN L. CULBERT

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please.

The Witness: John L. Culbert.

Direct Examination

By Mr. Rosensweig:

Q. Mr. Culbert, will you keep your voice up so we can all hear you?

What is your present rank?

A. My present rank is AD, first class, AP.

Q. In simple, ordinary language, what does that mean?

A. The AD is Aviation Device, which consists of being an aviation mechanic, and the first class is self-explanatory; the AP is for Aviation Pilot, being an enlisted pilot status.

Q. You are a pilot. A. Yes, sir.

Q. How long have you been a pilot?

A. I received my wings in March, 1947.

Q. You have been flying airplanes of what type during the period from 1947 to the present time?

A. Well, the first year I flew patrol bombers

(Testimony of John L. Culbert.)

PBM type, and then went to the utility shops, the radio control, [22] and have been in there ever since.

Q. How much experience, Mr. Culbert, have you had with the operation and control of drone planes?

A. Well, approximately three years' experience with it. There are certain qualifications for this, and I am considered fully qualified for this radio control work. They have different phases of radio control.

Q. Were you at one time during your service in the Navy, Mr. Culbert, stationed at the Chocolate Mountain Gunnery Range?

A. Only through temporary, additional duty from the Marine Corps Air Station, El Toro.

Q. When you had your additional duty at the Chocolate Mountain Gunnery Range, what were those duties?

A. They varied from day to day on the different control stations for this radio control.

Q. Calling your attention, Mr. Culbert, to the date of March 8, 1950, were you stationed at that time—where were you stationed at that time?

A. Well, I understand this date is the date in question here. On that date my duties were what is called Charlie Two position, which is a secondary control plane, and it is a fighter type plane which is standing by to take control in case the Charlie One plane loses control, and if both of us lose control and the plane is endangering public property [23] it is his job to destroy the target.

(Testimony of John L. Culbert.)

Q. What type of plane were you piloting on the morning of March 8, 1950?

A. That was an F6-F Grumman fighter.

Q. Was that a one-pilot affair or were co-pilots involved, or were you by yourself, or just what was it?

A. No, sir, that is a single seat fighter.

Q. Referring to this date of March 8, 1950, at about the hour of 10:05 in the morning, will you explain to us as best you can, Mr. Culbert, what occurred when you were in flight with the drone that was involved in this accident that occurred at that time.

A. Well, we rendezvoused with the firing group on the southern end of Chocolate Mountain and we were running runs through the center of the Chocolate Mountain Range, from the lower tip to the mountain tip. I don't know what run it was, or nothing like that; we were on a southeasterly heading when the drone was hit and, of course, we—presuming the drone was hit by one of these firing planes the drone would go out of control. The Charlie One plane, which is of a two-seated type, was controlling the plane. The co-pilot was controlling the target and he was flying directly behind the drone, back a safe distance, and I was flying wing on him. When the plane was hit at approximately 8000 feet it went into a left turn and it was going into a steep spiral; [24] we were in the center of the Chocolate Mountain Range and, therefore, there was not much reason for trying to destroy the drone. It was going straight in.

(Testimony of John L. Culbert.)

Q. Was it usual practice when a drone plane got out of control that way you, being Charlie One, would be ordered to destroy it?

A. Only if the plane was going to endanger public property or——

Q. In your opinion at that time was it?

A. ——or leave the range itself.

Q. From where you were located in the air at that time and flying the position you were, do you have any opinion as to whether or not that drone plane had gone out of control and was about to endanger private property?

A. In no way. It couldn't possibly have endangered any public property that was visible.

Q. You were up about 8000 feet?

A. Yes, sir.

Q. This mission you were on, what is that type of mission generally called? What is it referred to as?

A. That was air-to-air, nolo.

Q. What?

A. Nolo; that is a word derived from this type of operation, solo being one, there being no pilot on this it is called nolo. [25]

Q. How many planes, if you recall, both piloted planes and drone planes were involved in the particular mission that we have reference to in this case?

A. Well, there was three controlled planes in the target drone. For security reasons I don't believe I should tell anything of the firing group itself.

(Testimony of John L. Culbert.)

Mr. Rosensweig: Your Honor, may I make this statement at this time: that there are certain confidential matters that I have been unable to obtain, which cannot be divulged even at the time of trial; but if your Honor desires that information, your Honor can order the witness to answer.

The Court: Well, I don't think I would do that now. There is a way of getting these confidential communications providing they are not ultra strategic in these cases.

Mr. Rosensweig: Apparently that is where these particular records are presently lodged.

The Court: I want to know a little bit more about that no drone. Is that applicable to the target?

The Witness: What is that?

The Court: No drone.

The Witness: Nolo.

The Court: Yes, nolo.

The Witness: Well, on a dual flight you have more than one pilot; on a solo flight you have one pilot. They have to have some way to designate the type of operation, and when [26] there is no pilot they designate it a nolo operation. This is an air type. We have air-to-air, and surface.

The Court: That term applies to the drone itself?

The Witness: To the operation, yes, sir.

Q. (By Mr. Rosensweig): On this particular mission, Mr. Culbert, as I understand it, there was a plane piloted by yourself, there was a plane

(Testimony of John L. Culbert.)

piloted by Lieutenant or Ensign Stephenson, and co-piloted by Burton Smith, and there was the drone involved. Is that correct?

A. There is a little correction on that. The other plane was piloted by Lieutenant Smith and co-piloted by Stephenson.

Q. Then there were actually four planes involved in this particular operation?

A. Yes, sir. Correction on that, sir. There was three planes in the nolo group, and then there was a firing group. Ensign Stephenson and Lieutenant Smith was in one aircraft, and then there was the aircraft I was flying in, and the drone, which is three planes.

Q. How many planes were in the firing group?

A. That I can't disclose.

Q. I cannot hear you.

A. I don't believe I should disclose that information, sir.

Q. I see. How far were you away from the drone when [27] it was struck by the firing group, Mr. Culbert?

A. I estimate approximately 300 yards.

Q. Could you see the drone very clearly?

A. Yes, sir.

Q. Was the condition of the weather very clear?

A. Yes, sir.

Q. Any overcast or clouds or was it raining, or anything of that sort?

A. No, sir, ceiling visibility unlimited that day, sir.

(Testimony of John L. Culbert.)

Q. After the drone was struck by the firing group what did you first see?

A. The drone immediately went into a sharp left turn and proceeded into a deep spiral towards the ground.

Q. Did you seek to follow the drone down to the ground at all?

A. Well, immediately upon the left turn the Charlie One plane gave the control to me, which was the normal procedure in case it was his transmitter that went out, and I tried to regain control of the drone, and in doing so I followed the drone to the ground; yes, sir.

Q. Were you able to gain control of the drone?

A. No, sir, not at any time.

Q. Have you ever received any standing order, Mr. Culbert, that when one of these drones gets out of control [28] you are supposed to shoot it down?

A. The only orders I have received on that is that only if it was leaving the range or it was endangering Government property, and then my directions to shoot it down would be given by the pilot of Charlie One plane, which in that case would have been Lieutenant Smith.

Q. From your knowledge and experience in this particular field of aviation, Mr. Culbert, what is the usual practice concerning the destruction of those planes as they proceeded to the ground, when out of control, after they have been fired?

A. If the plane is going straight in or spiraling

(Testimony of John L. Culbert.)

fairly steep, where you can tell approximately where it is going to hit and it is not going to endanger any property, there is nothing possible to do there, nothing reasonable to do. However, if the plane seems to pull out of the spiral and leave—head towards the boundary of the area, even, the Charlie Two plane, which in that case was myself, would charge his guns and pull up close enough to the plane to destroy it completely.

Q. From your experience in this particular field of aviation, Mr. Culbert, how many of those drone planes are usually destroyed percentagewise, if you know?

A. Well, by the firing groups on this type of operation, on the air-to-air operation, I would say approximately [29] 90 per cent of the drones are lost in the firing, a very small percentage of those, however, having to be shot down by the pilots. I say out of 90 per cent maybe five per cent would have to be destroyed by the Charlie Two plane.

Q. Do you have any knowledge, Mr. Culbert, as to the extent of the area of the Chocolate Mountain Gunnery Range?

A. To my memory that range, the longest point from south to north is approximately 70 miles and the widest point on that range was approximately 27 miles.

Q. Mr. Culbert, I show you a map that is designated in the extreme top portion of it, "Danger—no trespassing, Camp Dunlop Aerial Gunnery Range, U. S. Naval Air Bases, San Diego, Cali-

(Testimony of John L. Culbert.)

fornia," and ask you whether or not in your opinion the heavy white lines which appear upon that map delineate the area generally known as the Chocolate Mountain Gunnery Range?

A. To the best of my knowledge.

Q. Could you indicate to us from that map, Mr. Culbert, approximately where the power lines were located and where this mission that you were seeking to accomplish was taking place?

A. We were firing from the southeast tip, we were running from this tip to the longest tip here, of course, turning inside to give us plenty of room in case they would lose control, and we were right in the center of the range [30] when it went out of control, and in going down to investigate the crash afterwards I noticed when I finally—it was the first time I noticed the high lines was between the bend and the fork of this road that runs along the high lines, which would be approximately this position right here.

Mr. Rosensweig: May I have a pencil so I can mark that?

The Court: Yes.

Q. (By Mr. Rosensweig): Can you mark a round circle about where you believe it is. It is pretty difficult to see, your Honor, on a black map. Maybe the Clerk has a colored pencil?

The Clerk: No.

Mr. Rosensweig: May I offer this, your Honor, as Defendant's Exhibit No. 1?

(Testimony of John L. Culbert.)

The Court: So received and marked Defendant's Exhibit A.

Q. (By Mr. Rosensweig): Mr. Culbert, when you were seeking to accomplish this mission that you were on the day in question, March 8, 1950, and at the time that this drone plane was fired upon, as you followed it down to the surface of the ground did anything unusual happen that you recall?

A. No, sir, nothing unusual to normal operation.

Q. It was the same, ordinary procedure that you had gone through on many, many occasions? Is that correct?

A. Yes, sir. We have a set procedure for these operations. [31]

Mr. Rosensweig: Your witness.

Cross-Examination

By Mr. Carman:

Q. Mr. Culbert, before starting out on the gunnery mission, did you have a briefing?

A. Yes, sir. We have a firing conference with firing groups prior to every operation.

Q. At that briefing was the presence of the power line pointed out to you?

A. The Chocolate Mountain Range was pointed out to us. The lines were marked on the chart; yes, sir.

Q. Was the power line itself pointed out to you?

A. Not to the point, no sir.

(Testimony of John L. Culbert.)

Q. Did you have any knowledge that it was there when you were firing on the drone target plane?

A. Yes, sir, I had seen it on the chart.

Q. You say you were flying at an altitude of approximately 8000 feet at the time the drone was struck?

A. Yes, sir.

Q. Could you see the power line from that altitude?

A. No, sir.

Q. You could not have seen it had you been looking?

A. I believe it would be impossible. Power lines are aluminum colored and pretty hard to see on that desert.

Q. But you had known the power line was down there, [32] you had seen a map and sketch and knew the approximate location of the power line with relation to the range?

A. Yes, sir.

Q. Could your exercises have been conducted in such a manner that you would not have to fly that mission over the power line?

A. I could answer that either way. It wouldn't fully accomplish our mission, not be a satisfactory operation to shorten the range where we wouldn't have to cross the power line.

Q. How long and how wide is the range, do you have any idea?

A. As I stated before, approximately 70 miles long and 27 miles wide.

Q. Where is the power line located with relation to the range?

A. It is perpendicular to the left of the range

(Testimony of John L. Culbert.)

approximately halfway up.

Q. So that you would have a course, then, of about 35 miles to fly if you went only to the power line and then turned around?

A. It wouldn't be 35 miles if we turned within a safe limit.

Q. Yes, all right. However, you could have ceased firing approximately a few miles before you reached the power [33] line, then commenced again on the other side and still have conducted a satisfactory mission, could you not?

A. It would not be satisfactory; no, sir.

Q. How large a gas supply does this drone target plane have? How many hours can it stay up?

A. I can answer that several ways. We have several types of auxiliary tanks we can install in the cockpit and we can arrange that anywhere from an hour and a half to four hours.

Q. With the drone plane that was out on March 8th, what was the gas supply?

A. Approximately two hours.

Q. What time did the mission start?

A. That I cannot recall.

Q. Was it before 9:00 o'clock?

A. I can't recall that, sir.

Q. Was any investigation made of the plane after the accident?

A. As I followed it down my order, received from Lieutenant Smith, was to drop to the ground and investigate the wreckage, and this being of a—the drone being of confidential—certain parts of it are confidential matter to the Navy, if there was

(Testimony of John L. Culbert.)

any large portion of it left a guard would have been set out immediately to stand guard on it. So I was ordered down to investigate the wreckage, and [34] the drone was completely destroyed and after we returned to the base a party was sent out, to my knowledge.

Q. Did you land at that time and investigate the wreckage or just passed over it?

A. I only passed over it, sir.

Q. Do you know if the investigation showed whether or not there was any gasoline left in the tank of the drone plane?

A. There wasn't enough of the tank left, sir, to tell that.

Q. Had there been gasoline in the tank when the drone crashed, is it not quite probable that the drone would have burned?

A. I believe I would be unable to answer that question. It would be a 50-50 deal.

Q. Did you have any orders as to how long you were to stay up firing on the gunnery range?

A. Yes, sir, all our firing exercises have a time of termination.

Q. Were you ordered to return the plane to the base or was it to be destroyed at the range?

A. If the plane was not destroyed by the firing group it was to be returned to the base.

Q. You say your job as Charlie Two is to destroy the plane if it appears to go off the range or if it endangers [35] public property. Is that correct?

A. Yes, sir.

(Testimony of John L. Culbert.)

Q. And you followed the drone plane down to what altitude after it struck?

A. When I passed over the drone I would say I was at approximately 50 to 100 feet.

Q. Were you able to see, before the drone struck, that it was quite likely to fly into the power line?

A. No, sir, I never saw the power lines until I went down—until I was clear to the ground, investigating the drone, and I saw the power lines at that time, and Lieutenant Smith was following me in and I warned him, and to my knowledge that is the first time I realized power lines were there.

Q. Do you have any method of destroying the drone other than by shooting it down? Do you have any radio control by which you can destroy it?

A. No, sir.

Mr. Carman: That is all.

Redirect Examination

By Mr. Rosensweig:

I just have one or two more questions, your Honor.

Q. Mr. Culbert, I believe you testified that you examined the map prior to the time you went on this mission. Is that correct? [36]

A. Yes, sir, all firing ranges and caution areas are marked on maps and displayed in our radio rooms.

Q. And on these maps there are particular

(Testimony of John L. Culbert.)

markings concerning habitation, concerning cattle, farms, electric lines, and things of that sort. Is that correct? A. Any permanent fixtures.

Q. They are all indicated on those particular maps? A. Yes.

Q. Had you known, Mr. Culbert, that these power lines were immediately in the vicinity of where that mission was being accomplished and where the drone went out of control would your actions have been any different, had you known those power lines were there, than what you actually did under the circumstances? A. No, sir.

Q. They would have been the same?

A. Yes, sir.

Mr. Rosensweig: That is all.

The Court: Mr. Culbert, did the drone go out of the direction of either of the planes, the one you were flying or the one the other man was flying, after it was hit?

The Witness: I don't quite understand, your Honor. It did change the direction of our course, yes, sir, but it was kept in front of my plane at all times.

The Court: Could you direct its course after it was [37] struck?

The Witness: No, sir.

The Court: Could the other plane direct it?

The Witness: No, sir.

The Court: The purpose of the mission was to destroy the plane, wasn't it? One of the objectives

(Testimony of John L. Culbert.)

of the mission? I am not asking for any strategic matter.

The Witness: For morale purposes of the gunnery, if it was possible for them to destroy the plane, yes, sir, that was the mission.

The Court: In other words, a test of marksmanship, wasn't it?

The Witness: This drone-type of firing is one of the finished phases of firing. It gives the pilot and the gunnery crews the nearest thing to actual combat, readying him for combat firing.

The Court: I don't know that I understood one of your answers. I understood you to say that one of the objectives of the mission was to bring the drone plane into the airport.

The Witness: If a firing group is unable to destroy the plane it is returned and landed at the home base and used all over again.

The Court: In other words, if they failed in the marksmanship test the drone is brought back into the field.

The Witness: Yes, sir. [38]

The Court: But the purpose of the mission was not that. The objective of the mission was to destroy the drone?

The Witness: If possible, yes.

The Court: And the test that the men were put to was to determine their efficiency in that operation?

The Witness: Yes, sir.

The Court: I wasn't clear on one answer. I

(Testimony of John L. Culbert.)

think I am, but I am going to ask you again. After the target was struck there was no way for either of the planes, one or two, to direct its course?

The Witness: No, sir, no way whatsoever.

The Court: Are you able to estimate the height at which the drone was flying when it was struck?

The Witness: Yes, sir, approximately a thousand feet.

The Court: Were you proceeding or following at that time?

The Witness: I was following.

The Court: At about the same elevation?

The Witness: Same elevation, yes, sir.

The Court: Where was plane No. 1?

The Witness: I was flying wing on plane No. 1. It was directly behind the drone, I would estimate 300 yards.

The Court: Where was plane No. 2?

The Witness: I was plane No. 2, sir.

The Court: There were two planes? [39]

The Witness: Two control planes, yes, sir.

The Court: Where was the other plane?

The Witness: There were two control planes and the drone, sir.

The Court: Oh! Well, were they both flying together, the two planes?

The Witness: Yes, sir, the two control planes were flying wing.

The Court: As you were under order to descend

(Testimony of John L. Culbert.)

to make an inspection, how close did you come to the terrain where the plane had landed?

The Witness: Approximately 50 to 100 feet.

The Court: Did you say your orders were to alight or to inspect.

The Witness: Just only to inspect, sir. There would have been no way to land in that terrain.

The Court: Too mountainous?

The Witness: Yes, sir, it is rather hilly, and we would be unable to land aircraft in that soft a sand.

The Court: Could you clearly see the power lines at that time?

The Witness: Only when I approached the wreckage of the drone at low altitude did I notice the power lines.

The Court: That is all.

(Witness excused.) [40]

Mr. Rosensweig: I will call Burton Smith.

BURTON EDWARD SMITH

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please.

The Witness: Burton Edward Smith.

Direct Examination

By Mr. Rosensweig:

Q. What is your rank in the United States Navy?
A. Senior lieutenant, sir.

(Testimony of Burton Edward Smith.)

Q. How long have you been a senior lieutenant?

A. For approximately five years.

Q. What department or division of the Navy are you connected with?

A. Naval aviation, sir.

Q. How long have you been connected with that division or department of the Navy?

A. Approximately nine years, sir.

Q. Are you a pilot, Lieutenant?

A. Yes, sir.

Q. How long have you piloted airplanes?

A. For approximately nine years, sir.

Q. That has been all in the Navy? [41]

A. Yes, sir.

Q. What type of planes have you piloted?

A. I have piloted single engine, twin engine aircraft, and four engine aircraft.

Q. Have you instructed other pilots?

A. Yes, sir.

Q. How long have you instructed other pilots?

A. I have instructed for approximately two years, sir.

Q. How long were you connected and have you been connected with the drone operation of planes, Lieutenant?

A. I was with that type of squadron for approximately two and one-half years.

Q. Are you so presently engaged?

A. No, sir, I have just recently been transferred.

Q. Have you been connected with the operation

(Testimony of Burton Edward Smith.)

of drone planes both from the technical operation of them and from the operation of gunnery practice on them?

A. From all phases, from aviators' standpoints.

Q. You have had experience in firing upon drones, have you not?

A. No, sir, I have not.

Q. But you have had experience, about two and one-half years' experience, in the control of drones?

A. Yes, sir.

Q. And that is the particular field of drone airplanes [42] in which you are particularly qualified. Is that correct? A. Yes, sir.

Q. Calling you attention, Lieutenant, to the date of March 8, 1950, about the hour of 10:05 a.m., in the area generally known and described as the Chocolate Mountain Gunnery Range, were you present on that day and about that time in that area? A. Yes, sir, I was.

Q. Will you tell us what occurred, commencing from the time you took off in the morning until such time as an accident occurred there involving a drone and certain power lines belonging to the California Electric Power Company.

A. Yes, sir. The exact time of takeoff I don't remember, but we were conducting an exercise in the Chocolate Gunnery area; there were a number of planes firing on our drone. We were at approximately 8000 feet conducting these firing exercises. Just how many runs occurred before the drone was shot down I don't remember, but on one of the runs

(Testimony of Burton Edward Smith.)

the drone was finally hit, when the drone was hit it immediately went into a steep turn, spiraling towards the ground. At that time Charlie One, which was the plane I was flying in, we gave control to Charlie Two, to see whether he could possibly regain the control that we lost. We made every effort to gain control of it and was unable to do so. We were over our firing area and there was no reason to give an order to [43] Charlie Two to try and destroy the plane, and so far as—I would like to explain, destroying the aircraft, you do not destroy the aircraft to stop the aircraft from progressing, you shoot it down. When you destroy it it doesn't disintergrate in the air, you merely stop it and it goes down some place in that area, and there was no reason from my experience to give such a type of order. The drone crashed, and because Charlie Two is a fighter-type aircraft, he was able to dive, and naturally able to get down to the ground a lot faster than I am in a twin engine aircraft, so he was ordered to proceed immediately to investigate it before I could get down there, and he investigated the wreckage, and also said that the drone had crashed into the power lines.

Q. Lieutenant, over what period of time had you flown missions over that Chocolate Mountain Range?

A. We had conducted the exercises over there for a number of weeks, the exact number I don't know, sir.

Q. Did you have any knowledge during the

(Testimony of Burton Edward Smith.)

period of time you were conducting the missions, these practice runs, whatever you call them, of any power lines in the area?

A. Only from the fact that the maps that we used indicated that there was a power line in that firing area.

Q. But other than the fact that these power lines had been pointed out to you, or you saw them on the maps, you never did actually see the power lines prior to the time they [44] were called to your attention. Is that correct? A. No, sir.

Q. Do you recall how long you had been in the air prior to the time you lost control of the drone?

A. I would only be guessing, sir.

Q. Guess some approximation.

A. I would say one-half hour to forty-five minutes.

Q. Do you recall whether anything unusual happened in the operation of this particular mission? A. Nothing unusual happened, sir.

Q. What has been your experience, Lieutenant, concerning the number of drone planes that are taken into the air for gunnery practice, of the type that was involved on this particular day, are actually destroyed?

A. Almost every aircraft we take out on a firing exercise that is being fired upon by other planes is usually destroyed. There is a small percentage that we do bring back.

(Testimony of Burton Edward Smith.)

Q. These drone planes, they were generally controlled by radio control, were they not?

A. Yes, sir.

Q. And when the practicing gunner on the gunnery aircraft destroys the radio by which the drone is controlled then you lose control of the drone itself, do you not?

A. That is correct, sir. [45]

Q. Is there any other way you can lose control of the drone?

A. It is possible to have some type of radio trouble with the electrical operating, that something could have occurred that we lost control. That is one reason we have another plane with the same type of equipment we have.

Q. At the time these drones are flying in the air they are under motive power themselves, are they not?

A. Yes, sir, but for directional control they are by radio, sir.

Q. Assume, Lieutenant, that one of these gunners on one of the other planes in the gunnery practice happened to strike the motor and not the radio control, could you still control that plane?

A. By the direction of the aircraft, yes, sir.

Q. But once the radio equipment in the drone is injured or destroyed you, as, I suppose, the "mother" plane lose control of the drone. Isn't that correct?

A. Yes, sir.

Q. In your experience and from your background as a Navy pilot, on the occasion in question, Lieutenant, was this a normal operation?

(Testimony of Burton Edward Smith.)

A. Yes, sir.

Q. There was nothing unusual about it?

A. No, sir. [46]

Q. You received your orders and directions to go on this particular mission and you returned as mission accomplished. Is that correct?

A. Yes, sir.

Mr. Rosensweig: Your witness.

Cross-Examination

By Mr. Carman:

Q. Lieutenant Smith, I understand that the plane took a sharp, left spiral turn after it was hit, the drone plane, that is. A. Yes, sir.

Q. Did it go directly down?

A. In a spiral—a spiral is in a left-hand turn, loss of altitude, not in a steep dive.

Q. So it probably went left not directly where it was hit but in a relatively small area beneath which it was hit.

A. No, not necessarily; it was covering quite a large area, although it was still entirely within the firing area.

Q. Were any of the pilots or all of the pilots given orders not to fire on the drone when they were in the vicinity of the power line?

A. No, sir. I would like to explain on that, that anything within the firing area—it is presumed there is nothing in there to destroy or endanger. I mean, there is actual firing done, and so far as that is concerned in firing [47] areas anything

(Testimony of Burton Edward Smith.)

below that is—there is nothing to hurt or destroy, or anything else, so long as the exercise is conducted over that area, there is nothing can be hurt.

Q. So far as your orders were concerned, then, it was perfectly all right for the plane to be shot down within any place in the gunnery range?

A. Yes, sir.

Mr. Carman: That is all.

Mr. Rosensweig: I have no further questions.

The Court: I did not understand one answer, Lieutenant; maybe it was because I did not get it clearly. Mr. Rosensweig asked you here about the target having been struck. I think he said if in the engine, whether or not there would be any loss of direction or power to the planes, plane No. 1 and plane No. 2. Is that true?

The Witness: Well, sir, if the drone was shot in the engine naturally it loses its power to remain airborne and it would have to go down, although we would have the directional control in turns and making the nose go up and down. But, naturally, the power that keeps the airplane in the air is the engine, and if that was shot it would bring the plane down.

The Court: In other words, that would be Newton's Law of Gravitation; it would fall.

The Witness: Yes, sir. [48]

The Court: I don't mean that. What I mean is this, Lieutenant: If the target were struck so as to disable it from being an airborne instrumen-

(Testimony of Burton Edward Smith.)

ality, is there any way that the directional plane, the two planes that have been mentioned by the young man who testified, could direct where that plan would fall, where the target would fall, the drone?

The Witness: It is possible that so long as the radio equipment remained in good condition. Does that answer it?

The Court: Yes. I think that connotes that in order to destroy the directional element on your two planes, either of them, that the target must be struck in a vulnerable point that would put the controls out of commission.

The Witness: Yes, sir.

The Court: That was the case here, wasn't it?

The Witness: Yes, sir, and it usually is. I mean, the exercises that are conducted by a firing group are very fast, and a number of runs are made, and they usually, eventually always shoot it down unless they are very new pilots and they have had very little experience. But by the time they give this exercise with the drone they are usually very capable.

The Court: At what relative speed does the drone proceed with respect to the speed of the other two planes, the control planes?

The Witness: The TD-2 varies, because we do use evasive tactics to create regular fighter tactics; but I would say the speeds varied, would vary between 110 knots and, say, 150 knots. [49]

The Court: Do you know at what speed the

(Testimony of Burton Edward Smith.)

target was proceeding when it was struck, approximately, or is that something you don't want to publicize.

A. No, sir, it is not that. I mean, it occurred well over a year ago and I would just be guessing, sir.

The Court: Had there been any communication, using that term that sometimes I don't understand: briefing, about the location of the power lines there and the terrain around the Chocolate Mountain Range.

The Witness: There was no indication of anything specifically within the firing area, although we were given maps that would indicate to us anything that was within that area and, of course, all outside of the area.

The Court: The firing area was the whole of that mountain chain, wasn't it?

The Witness: Pardon?

The Court: Was the firing area all of that mountain chain at that time?

The Witness: Yes.

The Court: It wasn't restricted to any part?

The Witness: No, no, sir, the entire area was ours. In fact, in order to properly conduct the exercise almost the entire area had to be used, because we couldn't accomplish our mission properly if we didn't.

The Court: You could not have the military operation [50] without having the extensive area within which to operate, could you?

(Testimony of Burton Edward Smith.)

The Witness: No, sir.

The Court: I have nothing further.

Mr. Rosensweig: I have one or two more questions, if I may, your Honor.

Redirect Examination

By Mr. Rosensweig:

Q. I believe you said, Lieutenant, you had about two and one half years' experience in the operation of drone controlled airplanes. Is that correct?

A. Yes, sir.

Q. And you had about the same amount of experience—was that in the area of the Chocolate Mountain Gunnery Range, all that experience that you acquired, was that acquired in that area?

A. No, sir.

Q. During that two and one half years' experience that you got with the control of drone airplanes, was that likewise inclusive of experience that likewise was acquired with other airplanes firing upon the drone?

A. I don't exactly understand your question.

Mr. Rosensweig: Let me withdraw the original question and frame it this way:

Q. The two and one half years' experience you had with [51] drones would that include firing by other airplanes upon drones?

A. Oh, yes, sir.

Q. During this two and one half years' experience you had with drone airplanes, about how many missions have you got, approximately.

(Testimony of Burton Edward Smith.)

A. Well, I would approximate on firing from other aircraft approximately 20; a great deal of our exercises are conducted with ships also.

The Court: You mean surface boats?

The Witness: Yes, sir.

Q. (By Mr. Rosensweig): You have had about 20 missions that were similar or the same as the one in question?

A. Oh, yes, sir.

Q. In which this accident occurred?

A. Yes, sir.

Q. Was there anything different between the other 19 you went on and the one in question?

A. No, sir.

Q. It was all the same pattern?

A. Yes, sir.

Q. There was nothing unusual that occurred?

A. No, sir.

Mr. Rosensweig: No further questions.

Mr. Carman: Nothing further. [52]

(Witness excused.)

Mr. Rosensweig: Call Mr. Stephenson, please.

CLAUDE MARTIN STEPHENSON

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name.

The Witness: Claude Martin Stephenson.

(Testimony of Claude Martin Stephenson.)

Direct Examination

By Mr. Rosensweig:

Q. What is your rate, Mr. Stephenson?

A. Lieutenant, junior grade.

Q. How long have you been a lieutenant junior grade?

A. Approximately two months.

Q. On March 8, 1950, what was your grade at that time?

A. Ensign.

Q. What experience, Lieutenant, have you had in the operation of aircraft in the Navy?

A. I received my wings the 14th of July, 1948. I have been flying since that time.

Q. Did you have any aircraft experience prior to your joining the Navy?

A. No.

Q. Where did you receive your wings?

A. At the Naval Air Station, Corpus Christi.

Q. From there where were you assigned?

A. I was assigned to a utility squadron in the San Diego area.

Q. When did you become connected with the operation of drone airplanes?

A. In January of 1949.

Q. At the time you became connected with that particular operation where were you stationed?

A. At the Naval Air Station, Santa Ana.

Q. What has been your particular experience in the field of drone operation of airplanes?

A. I have been associated with drone operations since January of 1949 until approximately two months ago.

(Testimony of Claude Martin Stephenson.)

Q. In the performance of your duties, Lieutenant, with the drone operation of airplanes, where did all these exercises and missions take place particularly?

A. They took place around, out over the—at sea, or in the Chocolate Mountain Gunnery area.

Q. How many missions did you go on in the area of the Chocolate Mountain Gunnery range?

A. I don't recall. I would estimate somewhere between five and ten.

Q. You generally were a pilot or a co-pilot?

A. We varied in performance of the duties in connection with the operation. Sometimes I was the control plane, [54] I was in control of the drone as Charlie One, and sometimes I was Charlie Two.

Q. On the date in question, which would be March 8, 1950, about the hour of 10:05 a.m., wherein a drone struck a certain power line that belongs to the California Electric Power Company, do you recall that particular occasion?

A. Yes, sir, I do.

Q. What were your duties on that particular day? Were you a pilot or a co-pilot?

A. I was in the co-pilot's seat, the right seat; Lieutenant Smith was on my left as the pilot, and I was controlling the drone as Charlie One.

Q. You were controlling the drone at the particular moment when it went out of control, or before or after, or what?

A. I was controlling the drone up until the time it went out of control.

(Testimony of Claude Martin Stephenson.)

Q. How long had you been in control of it?

A. I don't remember the take-off time, but it was from——

Q. Approximately what period of time were you actually in control of that drone, if you recall?

A. I couldn't—it would be a pure guess.

Q. But you do know you were in control of it at the time it went out of control? [55]

A. Yes, sir, I was.

Q. Would you tell us in your own words, Lieutenant, what occurred immediately prior to and up to the time the drone went out of control.

A. We had rendezvoused and made a series of runs from the southeast end of the area to the northwest, and had reversed our course and were on a southeast heading at the time the drone was hit, and the drone, upon being hit, executed a violent left turn, commencing a spiral, and I immediately had no control, further control. I told Charlie Two to take control and he acknowledged that he had his radio control gear on, but had no control of the drone. The drone continued in a spiral down, increasing speed, and the diameter of the spiral I couldn't say accurately, I would estimate between four and five miles in diameter, and I lost sight of it. The next time I saw it was just prior to the time it hit the ground, and I then saw a cloud of dust.

Q. At the time that the drone—you lost control of the drone, at what height were you flying?

A. About a thousand feet.

(Testimony of Claude Martin Stephenson.)

Q. What was the condition of the weather.

A. Ceiling and visibility unlimited.

Q. How long had you been stationed at or near this Chocolate Mountain Gunnery Range during the period of time you went on these ten missions?

A. Well, our home base was at the Marine Corps Air Station, El Toro, and when we were scheduled for operation in that area we would send a detachment to the Naval Air Station at El Centro, and we would take a detachment to El Centro and back to El Toro almost every week.

Q. At the time you went on these missions, Lieutenant, did you have occasion to examine certain maps and plats of the Chocolate Mountain Range? A. Yes, I did.

Q. Did you have any knowledge during the missions that you went on, including the mission involved in this particular case, that there were any power lines in the area of the Chocolate Mountain Range?

A. In the briefing I had seen the charts and the power lines were marked on these charts, but flying over the gunnery range my attention is more on the drone rather than just exactly where I am in the gunnery area, as long as I know I am in the area, and I did not know the exact location on the ground of the lines.

Q. Did you ever see the power lines prior to the time they were struck?

A. No, I didn't.

Q. You say you flew over the gunnery range

(Testimony of Claude Martin Stephenson.)

about ten different times or on ten different missions?

A. Yes, I had been on—between five and ten—I [57] would say it was closer to—well, I couldn't say; between five and ten times.

Q. In other words, though, you did criss-cross this area of the Chocolate Mountain Range on many occasions? A. Yes, I did.

Q. And you never actually saw the power lines until such time as this accident occurred?

A. That is correct.

Q. Did you follow Mr. Culbert down to examine the drone that had struck the power line?

A. Well, Lieutenant Smith was the pilot and naturally, Culbert, being in the fighter plane, could get down sooner. We went down and flew, I would estimate, around 100 feet, and saw the wreckage of the drone and the power lines. We did not—we made about one or two passes over the drone and didn't notice—I didn't notice the amount of damage that was done to the power lines.

Q. When you went down to see where the drone had struck the ground, did you notice the power lines at that time?

A. Culbert called us and told us to watch out for the power lines.

Q. That was the first time you had any knowledge that the power lines were there. Is that correct?

A. In that particular location, yes, sir, that is true. [58]

(Testimony of Claude Martin Stephenson.)

Q. From your knowledge and experience in the field of operation of controlled aircraft, was this a usual operation, this mission that you were flying on on the date this accident happened?

A. Yes, it was.

Q. Did anything unusual occur?

A. Not a thing, sir.

Q. It was the same operation that occurred on other operations you have been on?

A. Yes, sir, it was a set routine.

Q. In other words, it was a normal operation?

A. Yes, sir.

Mr. Rosensweig: No further questions.

Cross-Examination

By Mr. Carman:

Q. Lieutenant, could this target plane have crashed through some other cause than a bullet being lodged in its radio equipment?

A. Prior to the operation we make several checks, and the aircraft is in operating condition, the drone is in operating condition in all respects before we take it off. There is a chance, very small I would estimate, that the drone purely of its own accord would go out of control.

Q. If something went wrong with the radio equipment of the drone then neither the Charlie One nor Charlie Two [59] planes could control the drone. Is that correct?

A. That is correct.

(Testimony of Claude Martin Stephenson.)

Q. Was an inspection made of this drone plane before this particular mission?

A. Yes, it was.

Q. Was the radio equipment in perfect condition at that time?

A. Yes, it was.

Q. Did you receive orders or did you know of orders received by the pilots that were flying on this drone plane that firing was not to be done in the vicinity of the power lines?

A. No. The fact that we were in the Chocolate Mountain area, we assumed that there was nothing we could hurt in that area.

Q. No one in higher authority, then, pointed out to you that there was a power line down there and that you should be careful of it. Is that correct?

A. That is correct.

Mr. Carman: I have no further questions, your Honor.

The Court: Perhaps one or two questions, Lieutenant. How is the drone put in the air, in flight?

The Witness: On the runway we have a controlled truck, the drone is placed in position, lined up with the runway and the truck has an electronic gear in it, the truck takes [60] off the drones and once it is in the air he turns the control over to Charlie One, which in this case was myself.

The Court: You estimate the diameter of the fall after the drone was struck to be four or five miles. How did you arrive at that estimate?

The Witness: Well, the drone as it was hit was relatively slow, as it went into the dive it increased

(Testimony of Claude Martin Stephenson.)

speed and being in a turn, as it went faster the diameter increased, and by that I mean that you couldn't pick the exact spot over the ground where that thing was going to crash at the instant it was hit. It was in an ever increasing spiral as the speed increased, and at the time it was hit it was going quite fast, I would estimate in a four or five mile diameter.

The Court: You saw the place where the drone landed?

The Witness: Yes, sir, I went down afterwards.

The Court: Could you indicate the direction which it took with respect to the compass.

The Witness: When it hit?

The Court: Yes.

The Witness: I saw it just immediately before it hit and it was going in a southeasterly direction.

The Court: Where would this power line and the portion of it that was damaged, where would that be with respect to the place that you just described, directionally, I mean. [61]

The Witness: You mean in which direction the power lines run?

The Court: No, I mean where was the target when it began to precipitate itself toward the earth, with respect to the power lines; approximately.

The Witness: I don't know, sir.

The Court: Have you any idea how far away from the power line it was flying at that time?

(Testimony of Claude Martin Stephenson.)

The Witness: No, sir, that incident took place too fast, and I didn't notice any particular points at the ground level.

The Court: But you think that the circuambient situation extended four or five miles before it struck?

The Witness: That is my opinion.

The Court: It started in a smaller circle, of course, and then enlarged as it descended?

The Witness: Yes, sir. It only made about—I was going to guess the number of circles it made. I can't give you that either.

The Court: 8000 feet in the air?

The Witness: 8000 feet, a relatively short time before it crashed, maybe 30 seconds.

The Court: That is all.

Mr. Rosensweig: No further questions. You may step down, unless you have some questions, Mr. Carman. [62]

Mr. Carman: That is all.

(Witness excused.)

Mr. Rosensweig: The Government rests, your Honor.

The Court: We will hear the rest this afternoon at 2:00 o'clock.

(Whereupon the noon recess was taken to reconvene at 2:00 o'clock p.m. of the same day.) [63]

Afternoon Session

The Court: Proceed, gentlemen.

Mr. Rosensweig: Just prior to the noon recess, your Honor, the Government rested its case concerning the introduction of any testimony.

At the conclusion, the Government again desires to review its motion to dismiss plaintiff's case on the grounds previously stated and, particularly again, not for the purpose of repetition, your Honor, but for the purpose of clarity, I wish to state that the Government's position is based upon three main points and three main factors, and they are as follows: That Congress has not consented under the Tort Claims Act for the imposition of any liability upon the United States or the Government on a theory of liability - without - fault. Number two, that the doctrine of *res ipsa loquitur* is inapplicable in a case of this character. Number three, that plaintiff has failed entirely to introduce or show by any evidence to support its position that any agent, servant and/or employee of the Government was negligent in the operation of the plane, or the drone which is alleged to have caused the damage which plaintiff sustained.

Those are the main grounds upon which the Government asks for a dismissal of this case and renews its motion upon those given grounds. [64]

The Court: I don't know whether all the evidence is in yet or not. Mr. Carman, do you have anything further you want to admit?

Mr. Carman: No, we have no further evidence, your Honor.

The Court: Then the record will show counsel's statement before Mr. Rosensweig's argument, and the motion will be denied without prejudice to the determination of the case, on the minutes.

Do you want to argue the case, Mr. Carman?

Mr. Carman: Yes, your Honor.

The Court: Proceed.

Mr. Carman: Defendant is liable to plaintiff for the negligent injury that it caused. Defendant knew of the exact location of plaintiff's power line, was under a duty to observe the necessary safeguards to prevent damage to that line; no precautions were taken. In fact, the uncontradicted evidence is that the pilots all believed that it was perfectly all right to shoot down and allow the drone plane to crash anywhere within the confines of the range. Had reasonable precautions been taken this accident would not have occurred.

In *Brouse versus United States*, 83 Federal Supplement 373, a Federal Tort claimant's case, and Army "Black Widow" fighter flying under robot control collided with an Aeronca Cub airplane, causing the small plane to crash and [65] kill the occupants. The Army pilot testified he kept a constant lookout for other planes, that he didn't know his plane collided with the Cub, nor what caused the damage to his plane. In holding the defendant liable, the Court, at Page 374 stated: "At the time of the collision the Black Widow fighter was flying through the air totally oblivious to its potential danger to other planes and wholly unmindful of its duty to observe the necessary safeguards to

prevent disaster. Had a proper lookout been maintained the collision would not have occurred. The plaintiff's rights of recovery are beyond question."

Plaintiff also relies on the doctrine of *res ipsa loquitur*. That doctrine is applicable in California. It is available under a general allegation of negligence and it has been provided in a Federal Tort Claims case arising in California, *San Diego Gas and Electric Company versus the United States*, 173 Federal second, 192, that involved crashing of an airplane into a transmission line. The doctrine applies, of course, where the instrumentality causing the damage was within the exclusive control of defendant, where plaintiff was without fault and where the accident is one which would not ordinarily have occurred in the absence of negligence.

It is obvious here plaintiff was without fault, that defendant had exclusive control of the target plane. [66] Here we have one lone power line located on defendant's gunnery range. Defendant certainly knew the exact location of that power line and was under a duty to observe safeguards necessary to prevent damage to the lines. Had it taken reasonable precautions, this accident would not have occurred.

Defendant has not shown that it was free of negligence, in fact, the uncontradicted testimony indicates there was negligence here, that no precautions were taken to prevent plaintiff's property from being damaged. Defendant, therefore, is liable. But, even assuming that defendant was entirely free of negligence, it is still liable to plain-

tiff for the damage it caused because it was engaged in an ultra hazardous activity and was liable without fault.

Counsel for the defendant alleges or contends that Government is not liable under the Tort Claims Act in the absence of negligence. The Federal Tort Claims Act provides the United States is liable for all the negligent or wrongful acts or omission of any employee of the Government while acting within the scope of its office and employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. It is quite true many of these ultra hazardous activities are not prohibited or prevented by law but at the same time when an accident occurs as a result of such activities, at least [67] so far as plaintiff is concerned, he has been wronged, there has been a wrongful act, he has been injured.

It seems to me the important point, the real heart of the Tort Claims Act, looking for the reason behind it, it is found in the last sentence which provides that "the Government is liable under the circumstances for the United States, if a private party would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Under the law of the State of California defendant would be liable to the plaintiff in this case.

The California Supreme Court in *Green versus General Petroleum Corporation*, 205 California

328, sets out the reason for the rule and then states the rule itself at page 333:

“Where one in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should in all fairness, be required to compensate the other for the [68] damage done.”

At the same page the Court said:

“It ought to be, and we are of the view it is the rule that, where an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damage regardless of any element of negligence either in the doing of the act or in the construction, use or maintenance or object or instrumentality, that may have caused the injury.”

The Restatement of Torts, Section 520, defines ultra hazardous activities as one which, (a) “necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care; and (b), is not a matter of common usage.”

The activity engaged in in this case falls squarely within that definition. Plaintiff's position in this case is very well stated by the Court in *Rochester Gas & Electric Corporation versus Dunlop*, 266 New York Supplement 469. In that case defendant's airplane crashed into plaintiff's power [69] line while flying over plaintiff's land at night. Plaintiff on two separate counts alleges negligence, relying upon *res ipsa loquitur* and trespass. The lower court dismissed the cause of action based on negligence and submitted the question of trespass to the jury. The jury found for the defendant. On appeal the court held defendant liable to trespass as a matter of law. And at page 472 the Court said:

“It seems to me that the plaintiff proved one or the other of its causes of action. If it can be said from human experience that an airplane will not fall except through negligence, then the plaintiff proved a *prima facie* case under its first cause of action. If, on the other hand, common experience requires the opposite conclusion, namely, that, no matter how perfectly constructed or how carefully managed an airplane may be, it still may fall, then the man who takes it over another's land and kills his cow or knocks off his chimney, has committed an inexcusable trespass. It must be kept in mind that, when damage occurs in such a case, one or the other party has to stand it, and no reasonable remedy suggests

itself why it should not be the one who has brought about the chance occurrence.” [70]

Thank you.

Mr. Rosensweig: May I be heard, your Honor?

The Court: Yes.

Mr. Rosensweig: I listened with a great deal of interest to Mr. Carman's argument on the question of the reasons why the Government should be held liable in this particular instance, and particularly when he mentioned the case of the San Diego Gas & Electric Company, which was one case I had the pleasure of trying before the Honorable Jacob Wineberger in San Diego. I happen to know something about that case and I can assure the Court and do assure the Court that case is entirely different from the facts we have here present. At the time of trial of this particular case it was definitely shown that the airplane involved was traveling I would say in violation of the Civil Aeronautical Rules and Regulations of California, in that it was flying at a height of less than 500 feet. Because the Court failed to take into consideration certain inferences which it should have taken in consideration at the time, our District Court reversed the decision. But in that particular case there was some evidence of negligence shown and in this particular case there is none, your Honor.

Counsel has cited the Dunlop case. That is a case that arose in New York, your Honor, in 1933, and it was a case that arose long prior to the

development and ordinary use [71] of the airplane as it is used today. Certainly it cannot be said that in 1933 the manufacturing development of the aircraft had developed to the degree that it has today, and as a result of it the Court at that particular time followed the rule of ultra hazardous activities, following the rule of liability-without-fault. Certainly in the development of the aircraft industry and passenger service and freight service by aircraft it cannot be said that aircraft travel and transportation is so unique today that it isn't a matter of common usage and common practice, and it is accepted in the same way as a mode of travel as are automobiles, trains, and ships. It certainly cannot be said that the airplane industry and airplane operation is in the field of ultra hazardous activities.

Counsel would have this Court impose upon the Government a liability - without - fault. The Tort Claims Act does not say that, your Honor. The Tort Claims Act says that the United States of America shall be liable for the negligent acts of its agents acting within the scope and duty of its employment. The language which he referred to "in a like manner" as if the Government were a private individual, it is my contention, your Honor, that the equation of the Government that it shall be liable in a like manner as a private individual does not come into play, and the comparisons cannot be made, until such time as the plaintiff [72] carries its burden of showing that some agent, servant and/or employee of the Government has

been negligent. Until there has ben some showing of negligence the equation and comparison of the Government with a private individual not being brought into play there can be no recovery for the reason there has been shown no negligence on the part of any agent of the Government. The burden is upon the plaintiff to show that there has been some negligence. The Court has heard the testimony here. Plaintiff has failed to show any negligence and I submit for that particular reason judgment should be for the defendant.

Counsel has cited many cases, or, several cases involving falling airplanes, he has cited from the Dunlop case in New York. I believe he could have cited the Smith case in California. There are many other cases he could have cited concerning the rules of law relative to falling airplanes. But I will submit, your Honor, in every one of those cases where the doctrine of *res ipsa loquitur* is to be applied, that it involves an airplane carrying passengers for hire, and I submit a different rule must apply when we seek to invoke the doctrine of *res ipsa loquitur* where passengers for hire are being carried and those passengers are injured. A passenger is entitled to a very high degree of care because that is the basic rule of law that we understand. They pay a given fee, or compensation, to be transported [73] safely, knowing little or nothing about the operation of an airplane, or what causes the damaging of it, or what causes the airplane to fall, and certainly it can be said thousands of airplanes fall a year without anybody

knowing why they fell or how they fell. Certainly it can be said there are many mechanical failures which cause an airplane to fall, which are inexplicable. Yet the individual carrying in airplanes of fee-paying passengers is with the highest degree of care, and for that reason I think the doctrine of *res ipsa loquitur* can well be applied. But certainly it cannot be said in the case we have before us, and even the case that counsel referred to concerning the two airplanes that happened to crash in midair, certainly there are distinguishing features about those two particular cases. Those are cases where the pilots were in error. In this particular instance the pilots were not in error. They were merely following orders, they were on a mission, they had done a job in a manner they were supposed to have done it. There was nothing unusual about the happening of the accident, nothing unusual about the carrying out of their particular mission, and they did their mission as it was supposed to have been performed.

So far as the plaintiff is concerned he has failed entirely to show that any of the pilots here introduced at the time of the happening of that accident did anything upon [74] which the Tort Claims Act says the Government shall be liable for. Government shall be liable for the negligent or wrongful act of its agents acting within the scope and duty of its employment, and it was for those particular reasons, your Honor, that the doctrine of liability - without - fault is not one that could be

placed upon the Government under the Tort Claims Act.

Number two, there is no showing by the plaintiff of any negligence so far as the agents, servants and/or employees are concerned; and, three, your Honor, that the doctrine of *res ipsa loquitur* does not apply where passenger-carrying airplanes are not involved. The burden must be carried by the plaintiff to show such negligence and he has failed to carry it. I sincerely believe, your Honor, the judgment should be for the Government.

Mr. Carman: Counsel for defendant says the doctrine of *res ipsa loquitur* has not been applied in the case of a plane crashing and doing injury to property on the ground it is applicable only to where a common carrier is involved. The rules as to the application of the doctrine of *res ipsa loquitur* are well known. That doctrine applies, as has been said before, when the instrumentality causing the injury was under the exclusive control of the defendant; plaintiff was not at fault, and when the accident is one which would not ordinarily have occurred in the absence of negligence—— [75]

The Court: We seem to have the wrong number on that San Diego case.

Mr. Carman: 173 Federal second, 192.

The mere fact that the doctrine has not been applied in such a case is no sign it shouldn't be applied if a case falls within the rule under *res ipsa loquitur*, is applicable, it should be applied. Defendant contends in this case either the doctrine of *res ipsa loquitur* is applicable, which would be the case

if we can say this is not the type of accident which would ordinarily occur without negligence, and if we cannot say that, then this must be the type of accident which may happen even with the exercise of the utmost care. In the event, the doctrine of liability-without-fault is applicable.

Now counsel says that aviation has developed to such an extent that the doctrine of liability-without-fault is not now applicable to it. That may be. Aviation in general, that is, commercial aviation and, perhaps, military aviation—certainly there is a much greater risk involved, a much greater hazard created when a radio-controlled target plane is taken aloft and fired upon by the military services than there was in taking aloft the conventional type of airplane, even in the 30's. If something goes wrong, as it did here on the drone plane, it is going to crash for sure. It is not going to come down with a proper landing. Even with [76] the old Jennies in the First World War engines went out very often, but the pilots were able to bring the planes down, they still had control and could direct the course of travel of those planes. The mere fact that aviation itself may not rightly be described as an ultra hazardous activity is no criterion by which we can say the particular action involved in this case was not an ultra hazardous activity.

The San Diego Gas & Electric case was cited for the proposition that the doctrine of *res ipsa loquitur* is applicable in California and that it may be applied under a general application of negligence.

The Court: Yes. I have that case here. Of course,

the decision of the Court of Appeals reversing the case was also based upon the violation of one of the aeronautical rules.

Mr. Rosensweig: Yes.

The Court: There is a principle there that is entirely absent here: The principle of imputed negligence. In other words, wherever there is a rule or law concerning the management of one's property, particularly some instrumentality that is activated by propulsion, whether it be an aircraft or a surface vehicle, or any moving object that is employed for the purpose of transportation of either persons or property, wherever there is such an instrumentality and the governing authority rules for the employment of that [77] instrumentality, the violation of the rule is negligence per se, and unless it is removed in the specific case by evidence contrariwise, the findings of the Court must be in favor of the party alleging negligence. I don't believe that principle is applicable here at all, for two reasons: The first is that the evidence fails to show that there was any rule, aeronautical rule, or act of Congress with respect to the military, that specified the manner in which this exercise (so-called by the officers) was to be done; and the second: That the question of weighing the evidence in a case, even though the doctrine of *res ipsa loquitur* does apply, and I think it does—I agree with you, Mr. Carman; I disagree with the Government on that phase of the case—that the doctrine of *res ipsa loquitur* is applicable in this case; but all that the doctrine of *res ipsa loquitur* does is, that, until it is answered by contrary evi-

dence, it justified the inference that where an injury is caused by an instrumentality that is shown to be exclusively within the dominion and control of a person (and there is no answer as to how the accident occurred), that then the Court may find an inference that the accident occurred by reason of the negligent conduct of the tortfeasor, the Government, in this case. I say that the doctrine, in my judgment, does apply in this case.

But that doesn't terminate this case, in my [78] judgment. For that reason the ruling was made as it was made at the conclusion of plaintiff's case-in-chief, the ruling was made with the reservation that it was made without prejudice to the determination of the case on its merits, at the conclusion of all the evidence. Now all the evidence is in.

In order to appraise this case we must take the climate of the case, the environment under which it arose, the instrumentalities that were employed by those who are concerned in the case, and any other rule of law concerning the appraisal of evidence that is ordinarily applicable in a tort case. Since the Government, by an act of Congress, permitted itself to be sued the provision of the Federal Tort Claims Act, Section 1346 of Title 28 of the United States Code, so far as applicable reads as follows Subdivision (b):

“Subject to the provisions of Chapter 171 of this Title, the District Courts, together with the District Court for the Territory of Alaska, the United States District Court for the District

of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission [79] of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

Now, that means that the local rule with respect to the principles underlying tort cases is to be applied although the case is in the domain of Federal jurisdiction. The local law of California, I think, has been heretofore stated by the Court; and I think, so far as the doctrine of *res ipsa loquitur* is concerned has been accurately stated by Mr. Carman. But the application of that doctrine to the concrete case is the question before the Court.

Now, what is the evidence? Epitomizing it, it is that these men of the Navy were engaged in what they called an “exercise,” which was a practice, or a mission, directed to the attainment of efficiency in the management of aircraft, not aircraft that was to be used at the time in the transportation of persons, but aircraft that was designed for and intended to be used in combat, in the destruction of property. I do not see much analogy there between the responsibility of commercial aviation, because,

as Mr. Rosensweig has pointed out, the rule there is that the same degree of care is to be exercised as is required to be exercised by the carrier of [80] persons on the surface: The highest degree of care. Well, of course men in military service are not required to use the highest degree of care; many times that would defeat the very purpose of the military. I think, perhaps, that is one of the reasons why younger men are those who would be classified in military activities. The matters of caution and circumspection and the highest degree of care are not compatible with the performance of military duty, especially when there is potential combat, or when the exercise is being directed toward the attainment of military excellence in the air.

What was there that these naval personnel could have done in the performance, or, to use the language of the Statute, “* * * within the scope of their offices or employment * * *” that they didn’t do? They were operating in a sphere, that we know from the history of the times, and from the history of this Court’s files, above terrain that has been condemned by the United States as part of the war effort. These Chocolate Mountains, we have had a lot of condemnation suits here that involved the acquisition of that land. Of course these rights-of-way have been excluded, that is true, the rights-of-way of these various enterprises that function there have been excluded from the taking. But that is a very narrow strip as compared with the extent of the terrain that is used for training purposes. [81]

Now the evidence is uncontradicted that at the

time the drone (and I will call it "target" for simplification) was struck, the aircraft involved the flying at about 8000 feet above the surface of the ground; 5280 feet—there is a mile and a half, almost, and it isn't reasonable to suppose the personnel were looking around on the ground; they were looking at the target. They were directing and, of course, exercising such care as would be prudent under the circumstances to aviators who were engaged in that sort of mission. They weren't required to look down to see what was there. It was in a remote part of the country. We have a right to consider that in determining whether or not there is negligence on the part of the United States. It was out in an isolated region selected because of its remoteness from habitation or population, really desert country, but mountainous, such a place that would afford the best means of enabling the aviator to solve problems that they would meet in other districts, and particularly one in which we are now engaged in the Orient, mountainous, and no habitation around that could be affected by the practice in which they were engaged.

When the missile which struck the target caused it to immediately precipitate itself to the ground, the evidence shows that there was a complete loss of control by the control ships, and the circumbience of the target took a very wide circumference, several miles in width. There was no way [82] of determining with precision as to where that was with respect to the power line that was damaged. There was no call, it seems to me, on the part of an aviator there

to exercise any care or caution that was not commensurate with the mission exercised, the practice in which they were engaging.

I don't find anything here that would justify the Court in saying that they did anything recklessly or carelessly or negligently. The matter in which they were engaged did not call for that nicety of calculation that is required in driving a vehicle on the surface; they were there in the air; there was one of the laws that has not yet been debated about, even by science: That the law of gravitation is immutable. There was nothing to hold an instrumentality in the air; when it is there it is going to drop to the earth and that is actually what occurred here. That is what was intended, of course. The evidence does show ordinarily it was the duty of the aviator to bring the target in, however it could be done, but that was an impossibility because all of their controls had been destroyed by the shot which struck the target.

I don't believe there is any justification here under evidence. The evidence preponderates to remove the question of negligence, I think, from the case.

Now, the argument that has been made that [83] the Statute, Subdivision (b), which I have quoted, contains a wrongful act or omission; what wrongful act or omission does the evidence show? Well, it shows that what they did destroyed this company's property. That is wrongful, yes. But then there is another principle of law which is applicable, and that is that there may be an injury without damage,

an old law school principle: *Damnum absque injuria*, you can injure a man's property and yet there is no compensation for that injury. There may be an inevitable accident in which there is a wrongful act committed, but who is responsible for it? That is the problem that arises in a civil court. I don't believe the evidence here justified the Court going to the extent of saying, even under the application of *res ipsa loquitur*, the evidence is so overwhelming that it supports a judgment for the plaintiff.

The damages will be found as claimed, but not assessed as claimed. I mean to say that if on review the reviewing Court should feel the Court is in error as to its interpretation of the evidence and as to its conclusions of law, there is no necessity of re-trying the case; the liability for the amount sued for will be clear, providing the reviewing Court, if there is to be a review, finds that this Court was wrong in its legal conclusions. For those reasons the finding will be in favor of the defendant, the United States, and against the plaintiff as to liability. [84]

You will prepare them, Mr. Rosensweig, and serve them on Mr. Carman.

Mr. Rosensweig: I shall do so, your Honor.

The Court: I have enjoyed the trial, Mr. Carman. I think you presented it very ably, and I am sorry I couldn't agree with you on the facts. [85]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the

United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of July, A.D. 1951.

/s/ FEROL M. HARVEY,
Official Reporter.

[Endorsed]: Filed July 3, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 17, inclusive, contain the original Complaint; Answer; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points and Designation of Record which, together with the Reporter's Transcript of proceedings on June 12, 1951, and original plaintiff's Exhibit 1 and defendant's Exhibit A, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$1.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 16th day of August, A.D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13059. United States Court of Appeals for the Ninth Circuit. California Electric Power Company, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 17, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Civil Action No. 13059

CALIFORNIA ELECTRIC POWER COMPANY,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

California Electric Power Company, Appellant above named, intends to rely on the following points on appeal:

1. The evidence does not support the finding of the Court that the injury to Appellant's property was not the direct and proximate result of the negligence or carelessness of Appellee or its agents, servants or employees.

2. The evidence does not support the finding of the Court that neither Appellee nor its agents, servants or employees trespassed on Appellant's property.

3. The doctrine of liability without fault is ap-

plicable under the Federal Tort Claims Act and the Court erred in not applying the same in this case.

HENRY W. COIL,

H. M. HAMMACK,

DONALD J. CARMAN,

KENNETH M. LEMON,

By /s/ DONALD J. CARMAN,
Attorneys for Appellant.

[Endorsed]: Filed August 17, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

California Electric Power Company, Appellant above named, hereby designates the entire record, as transmitted by the Clerk of the District Court, material to a determination of the appeal.

HENRY W. COIL,

H. M. HAMMACK,

DONALD J. CARMAN,

KENNETH M. LEMON,

By /s/ DONALD J. CARMAN,
Attorneys for Appellant.

[Endorsed]: Filed August 17, 1951.

No. 13059.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA ELECTRIC POWER COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

HENRY W. COIL,
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DONALD J. CARMAN,
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Attorneys for Appellant.

OCT 16 1961

PAUL P. O'BRIEN



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No. 13059.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA ELECTRIC POWER COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

Pursuant to the provisions of Sections 1346(b) and 2671, *et seq.*, of Title 28, U. S. C. A., commonly known as the Tort Claims Act, Appellant filed this action against Appellee in the United States District Court for the Southern District of California, Central Division, on August 30, 1950, and the jurisdiction of that court was based on said Section 1346(b) [R. 3]. After answer [R. 6] by Appellee the cause was regularly tried before the Court, sitting without a jury, on June 12, 1951 [R. 18]; the District Court promulgated its findings of fact and conclusions of law, and its judgment for Appellee on June 28, 1951 [R. 9, 14].

Appellant, being aggrieved thereby, filed its notice of appeal in the District Court on July 18, 1951 [R. 16]. This Court has jurisdiction to review such decision pursuant to 28 U. S. C. A. 1291, and the venue is properly laid in the Ninth Circuit, 28 U. S. C. A. 1294(1).

Statement of the Case.

This is an action filed by Appellant against the United States under the Federal Tort Claims Act to recover money damages for injury to Appellant's electric transmission line by a radio-controlled Navy drone target plane which crashed into said line on March 8, 1950.

The facts in this case are simple and, for the most part, undisputed. Appellee's answer admits [R. 6] that on or about March 8, 1950, and at about the hour of 10:05 A. M., certain Navy pilots based at the U. S. Naval Auxiliary Air Station, El Centro, California, were engaged in air to air gunnery exercises over the Chocolate Mountain gunnery range; that said pilots were firing on a drone target plane which was radio-controlled and operated by one of the pilots; that each of said pilots was employed by the United States of America and each was acting within the scope of his office or employment. Further, it was stipulated [R. 20] that Appellant is a corporation organized and existing under the laws of the State of Delaware and duly authorized to do business as a public utility corporation in the State of California; that on March 8, 1950, Appellant was the owner and possessor of that certain 88 kv electrical transmission line extending from Calipatria, California, to Blythe, California; that about 10:05 A. M., March 8, 1950, a Navy drone target plane (T D 2 C -1, Navy, 120001) crashed into said transmission line; that as a result of said crash steel poles Nos. 170, 171, 172 and 173 were caused to split and break, steel pole No. 168 was twisted and bent, and all three conductors were brought down; that said poles were located within the boundaries of the Chocolate Mountain gunnery range.

The only dispute was over the amount of Appellant's damage, and whether that damage was caused by the negligent or wrongful act of Appellee.

Appellant's evidence showed [R. 23], and the District Court found [R. 11, 12] that Appellant was damaged in the amount of \$7,330.75.

At the conclusion of Appellant's evidence the United States moved to dismiss the action on the grounds that Appellant had failed to show negligence and that the doctrine of *res ipsa loquitur* did not apply [R. 27, 28]. This motion was denied [R. 35].

Faced with the necessity of overcoming an inference of negligence, the United States presented evidence which consisted of the testimony of three Navy pilots whose duty it was to operate and control the drone target plane (hereafter sometimes referred to as "drone" or "drone plane"). They testified substantially as follows:

JOHN L. CULBERT, AD 1ST CLASS AP:

He is a qualified enlisted pilot experienced in the operation and control of drone planes [R. 37]. The Chocolate Mountain gunnery range covers an area approximately 70 miles long from north to south, and approximately 27 miles wide from east to west [R. 43]. The power line crosses the range, from west to east, approximately midway between the north and south boundaries [R. 46, 47]. The drone plane involved in this case was under the primary control of Lts. Smith and Stephenson who were flying in a two-seated aircraft known as the Charlie One

plane [R. 38, 41]. He, Culbert, was flying a single-seated aircraft known as the Charlie Two plane, a secondary control plane. It was his duty to take control of the drone plane when ordered to do so by Charlie One. It was his further duty, upon orders from Charlie One, to destroy the drone plane if it went out of control and endangered public property or threatened to leave the gunnery range [R. 37, 42]. The function of Charlie One and Charlie Two was simply to operate and control the drone target plane. The actual shooting was done by other pilots, flying other Navy planes, known as the firing group; the number involved is confidential [R. 39, 41]. These pilots fired upon the drone at an altitude of 8000 feet [R. 38]. The drone plane was struck while on a southeast heading near the center of the gunnery range [R. 38]. At that point Charlie One lost control and ordered Charlie Two to take over. He attempted, but was unable to regain control [R. 42]. He was ordered to follow the drone plane down and investigate the wreckage [R. 47]. There was not much reason for him to destroy the drone plane. It was going straight in [R. 38]. He didn't see the power line until after the drone had crashed [R. 49]. He had attended a firing conference before starting on the gunnery mission. There he had seen a chart of the Chocolate Mountain gunnery range upon which was shown the power line, but no one pointed out its presence to him. He did have knowledge, at the time the drone plane was being fired upon, that the line crossed the range. He knew its approximate location in relation

to the range [R. 45, 46]. The objective of the mission was to shoot down and destroy the drone plane [R. 51]. Approximately 90% of the drone planes fired upon in air to air gunnery exercises are shot down [R. 43]. Nothing unusual happened on this mission [R. 45].

BURTON EDWARD SMITH, SENIOR LIEUTENANT:

He is a qualified pilot, experienced in the operation and control of drone target planes [R. 54]. He was piloting Charlie One. Immediately after the drone plane was hit it went into a sharp turn to the left and spiralled toward the ground. Charlie Two was ordered to take control. Every effort was made to regain control. They were over the firing area and there was no reason to give an order to Charlie Two to destroy the drone plane [R. 56]. The maps that were used indicated that there was a power line in the firing area [R. 57]. There were no orders not to fire on the drone when it was in the vicinity of the power line. So far as orders were concerned it was perfectly all right for the drone to be shot down any place in the gunnery range. It was presumed that there was nothing in the range to destroy or endanger; that so long as the exercise was conducted over the range nothing could be hurt [R. 59, 60]. Nearly every drone plane taken on a gunnery exercise is shot down. Only a small percentage is brought back to the base [R. 57]. He had been on about twenty missions similar to the one in question. All followed the same pattern. Nothing unusual occurred this time [R. 64].

CLAUDE MARTIN STEPHENSON, LIEUTENANT J.G.:

He is an experienced pilot qualified in the operation and control of drone planes [R. 65]. He acted as co-pilot of Charlie One and actually controlled the drone plane until it was hit. After he lost control of the drone he ordered Charlie Two to take control. Charlie Two acknowledge he had his control gear on but was unable to regain control [R. 67]. The drone's radio equipment was checked, and found in order, prior to take-off. The chance that the drone would go out of control purely on its own accord is very small [R. 70]. At the briefing he had seen charts and the power line was marked on the charts [R. 68]. No one in higher authority pointed out the power line or told him to be careful of it [R. 71]. He didn't receive, or know of, any orders that firing was not to be done in the vicinity of the power line. They assumed there was nothing they could hurt in the Chocolate Mountain Area [R. 71]. The drone crashed approximately 30 seconds after it started to descend [R. 73]. It came down in an increasing spiral which had reached a diameter of from four to five miles by the time it struck the ground [R. 72, 73]. Nothing unusual happened during the mission. It was a routine operation [R. 70].

After all its evidence was in, the United States again moved to dismiss the action [R. 74] and contended, as grounds therefor:

1. That Congress had not consented under the Tort Claims Act to the imposition of liability under a theory of liability-without-fault;

2. That the doctrine of *res ipsa loquitur* is inapplicable under the facts of this case; and

3. That Appellant had failed to show negligence on the part of the Government.

The motion was denied [R. 75].

After hearing argument, the Court held that the Government had overcome the inference of negligence raised by the doctrine of *res ipsa loquitur* [R. 91], and that if a wrongful act had been shown which caused damage, it was *damnum absque injuria* [R. 91].

Specification of Errors.

1. The District Court erred in finding that the injury to Appellant's property was not caused by the negligent acts of the employees of the Government. The District Court's findings to that effect are not supported by any substantial evidence and are contrary to the evidence, and its holding to that effect is contrary to law. Reason: The evidence shows that Appellee, knowing of the existence and location of Appellant's property, engaged in an air to air gunnery exercise, the purpose of which was to shoot down a drone airplane, directly over that property; that the drone plane was shot down and crashed into said property.

2. The District Court erred in finding that the injury to Appellant's property was not caused by the trespass of employees of the Government. The District Court's findings to that effect are not supported by any substantial evidence and are contrary to the evidence, and its holding

to that effect is contrary to law. Reason: The evidence shows that Appellee intentionally shot down a drone plane and intended it to fall to the ground any place within the confines of the Chocolate Mountain gunnery range; that it did fall within the range and onto Appellant's property.

3. The evidence would support a finding that the injury to Appellant's property was caused by the wrongful acts of the employees of the Government. The District Court erred in not making such a finding. There is no substantial evidence which would support a finding that the injury to Appellant's property was not caused by the wrongful acts of the employees of the Government. Reason: The evidence shows that Appellee, knowing of the existence and location of Appellant's property, engaged in an air to air gunnery exercise directly over that property; that during the course of said exercise it intentionally shot down a drone plane which crashed into Appellant's property.

Summary of Argument.

The pertinent provisions of the Tort Claims Act in so far as a decision of this case is concerned, are Sections 1346(b), 2674 and 2680 of Title 28, U. S. C. A. Section 1346(b) confers jurisdiction on the District Court. Section 2674 sets forth the extent of the Government's liability, and Section 2680 enumerates thirteen exceptions to the broad waiver of immunity. These three sections are set forth in full in the Appendix and hereafter will be referred to by section number only.

Broadly speaking, the Tort Claims Act provides that the Government shall be liable for injury to person or property caused by the negligent or wrongful acts of its employees under circumstances where the Government, if a private person, would be liable under the law of the place where the act occurred.

The first three points of our argument, which show that under California law the Government would be liable to Appellant under any one of three separate theories, may be summarized as follows:

1. The evidence shows that the Government conducted an air to air gunnery exercise, the objective of which was to shoot down a drone plane, directly over Appellant's property. By so doing it created an unreasonable foreseeable risk of harm to that property. The drone was shot down and crashed into Appellant's power line. The District Court's erroneous finding that the Government was not negligent was based solely on evidence tending to show that the pilots who controlled the drone plane used due care. We contend that even though the act may have been done in a careful manner, it was an act which a reasonably prudent man could foresee would probably cause injury to Appellant.

2. The evidence shows that the Government intentionally, wilfully and voluntarily shot down the drone plane and intended it to fall to the ground any place within the confines of the gunnery range. It did fall within the range and onto Appellant's power line. As a direct re-

sult of this intentional unauthorized invasion of its property Appellant was injured. There is no substantial evidence to support the District Court's finding that the Government did not trespass on Appellant's property.

3. Under the law of California, one who engages in an ultrahazardous activity is absolutely liable for the damage he causes. Under the standards and tests of California law, one who takes aloft and shoots down a drone plane is engaged in an ultrahazardous activity.

Our fourth point, which shows that the act complained of was a "negligent or wrongful act" within the meaning of those words as used in the Tort Claims Act, may be summarized as follows:

4. The Tort Claims Act is a broad waiver of sovereign immunity against suit on torts. Its purpose was to transfer consideration of all tort claims, with certain specified exceptions, from Congress to the Courts. The Act should not be construed so as to add to the exceptions; it should be liberally construed. The words "negligent or wrongful act" are broad and comprehensive enough to encompass any act giving rise to a claim sounding in tort. Any act giving rise to a tort claim actionable under local law is a "negligent or wrongful act" within the meaning of 1346(b).

We conclude that regardless of the theory upon which the California Courts would predicate liability, the Government engaged in a negligent or wrongful act and would, if a private person, be liable in accordance with the law of the place where the act occurred. It follows that the Government is liable under the Tort Claims Act.

ARGUMENT.

1. The Evidence Does Not Support the District Court's Finding That the Injury to Appellant's Property Was Not Caused by the Negligent Acts of Appellee.

The District Court properly held [R. 13, 35] that the doctrine of *res ipsa loquitur* was applicable. The effect of this holding was to establish a *prima facie* case by raising an inference that Appellant's injury was caused by the negligence of the Government. (*Allbritton v. Interstate Transit Lines*, 31 Cal. App. 2d 149, 87 P. 2d 704; *Dierman v. Providence Hospital*, 31 Cal. 2d 290, 188 P. 2d 12.) In order to rebut the inference and overcome the *prima facie* case, the Government offered evidence consisting of the testimony of the three pilots charged with the operation and control of the drone plane. They testified that the purpose of the mission was to shoot down the drone plane [R. 51]; that the plane was shot down [R. 55], as it almost always was in such missions [R. 57, 61]; that it went out of control after it was struck [R. 67]; that they did all they could to regain control, but were unsuccessful [R. 67]; that nothing unusual happened on this mission [R. 70]. Viewed in the light most favorable to Appellee, this evidence shows that the pilots who controlled the drone plane exercised due care in following out their orders. They did not negligently let the drone go out of control. But this certainly is insufficient to rebut the inference that Appellee was negligent. It does not lead to the conclusion that the accident could not have happened from want of care but must have been due to some unpreventable cause, as is required by California law. (*Dierman v. Providence Hospital*, 31 Cal. 2d 290, 188 P. 2d 12, 15.)

Entirely apart from the inference, however, the evidence clearly shows that Appellee was negligent. And, there is no substantial evidence to the contrary. Even though we assume that the act was done in a most careful manner, it was an act which a reasonably prudent man could foresee would create an unreasonable risk of harm to Appellant's property. Appellee knew of the existence and exact location of Appellant's power line; the line was shown on maps and charts used in briefing the pilots [R. 45, 46]. Appellee sent out its pilots on an air to air gunnery mission with orders to shoot down the drone plane anywhere within the confines of the gunnery range [R. 60]. The drone plane on this type mission is almost always shot down [R. 57, 61]. No precautions were taken to protect Appellant's property from harm [R. 71]. The drone plane was shot down almost directly over Appellant's property [R. 38, 71, 72, 73]. After it was struck it went out of control [R. 56] and crashed into Appellant's power line [R. 56].

A breach of the duty to use ordinary care is negligence, and, if injury results, is actionable in California. We deem it unnecessary to cite cases. Appellee breached that duty and created a serious risk of harm to Appellant's property when it wilfully shot down the drone over that property. Appellee created the risk, disregarded it, and went right ahead to injure Appellant. Now it contends, in effect, that since the pilots who controlled the drone didn't negligently fly it into the power line it is not liable.

If all the Government need do is offer evidence that the pilots controlling the drone plane used due care, the chances are that no plaintiff in a case like this can recover. Unless the Government is held negligent when it engages

in air to air gunnery over private property regardless of the care used in carrying out the exercise, drone planes can be shot down and dropped through any person's home without liability.

The fact that Appellant's power line is located in a remote area is immaterial. It is obvious that the risk of harm to any particular piece of property is in no wise dependent upon the character of the surrounding area. If an unreasonable risk of harm was not created when Appellee shot down the drone plane over Appellant's property it would not be created, as to any home owner, if Appellee shot down a drone plane over a town. Such cannot be the law.

We submit that Appellee created an unreasonable foreseeable risk of harm to Appellant's property; that Appellant's injury was the direct and proximate result of Appellee's negligence.

2. The Evidence Does Not Support the District Court's Finding That the Injury to Appellant's Property Was Not Caused by the Trespass of Appellee.

The uncontroverted evidence shows that the shooting down of the drone plane was an intentional, wilful and voluntary act; that the purpose of the mission was to shoot down the plane [R. 51]. Appellee knew of the existence and exact location of Appellant's power line [R. 57]. The drone was shot down almost directly over that power line [R. 38, 71, 72, 73]. Appellee intended the drone to crash wherever it might fall within the confines of the gunnery range [R. 60]. No attempt was made to destroy or cause

the drone to crash in a spot other than where it was headed [R. 56]. Consequently, Appellee intended the drone to crash just where it did. The injury to Appellant's power line was the direct result of Appellee's act.

Regardless of whether Appellant's power line be considered real property or personal property, any unlawful interference therewith or unauthorized invasion thereof gives rise to an action in the nature of trespass under California law. (24 Cal. Jur., Trespass, Secs. 8 and 9.) Throwing or placing something on another's property is a trespass. (Rest. Torts, Secs. 158, 217.)

Certainly the destruction of Appellant's property under the facts of this case constitutes an unlawful interference therewith or unauthorized invasion thereof. We cannot understand the reasoning behind any contention that the Government did not engage in a wrongful act when it shot down the drone plane above private property. If the Government finds it necessary to engage in such activities it should either keep its distance from private property or stand ready and willing to compensate for any damage it causes. It has no right to trespass on private property without liability.

There is no substantial evidence in the record which would support a finding that Appellee did not trespass on Appellant's property.

3. Under California Law, One Who Engages in an Ultrahazardous Activity Is Absolutely Liable for the Injuries He Causes.

In the leading case of *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 Pac. 952, the California Supreme Court held that an oil well driller was liable, irrespective of negligence, for damage resulting to plaintiff's property when the oil well erupted. The Court said (270 Pac. 952, 955):

"It ought to be and we are of the view that it is the rule that, where an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damage, regardless of any element of negligence either in the doing of the act or in the construction, use or maintenance of the object or instrumentality that may have caused the injury."

In the case of *Luthringer v. Moore*, 31 Cal. 2d 489, 190 P. 2d 1, the California Supreme Court made it clear that the rule announced in *Green v. General Petroleum*, *supra*, should be applied in all cases where the wrongdoer was engaged in an ultrahazardous activity. The Court cites with approval (190 P. 2d 1, 7) the definition of ultrahazardous activity which is contained in Section 520 of the Restatement of Torts:

"An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage."

The Government, in the case at bar, took aloft and shot down a radio-controlled drone target plane. By so doing, the Government necessarily created a risk of serious harm to persons and property on the ground. Obviously, this risk could not be eliminated by the exercise of the utmost care in carrying out the activity. There can be no argument that the taking aloft and shooting down of a radio-controlled airplane is a "matter of common usage."

Undoubtedly, the activity engaged in by the Government in this case falls within the definition of "ultra-hazardous" as stated by the Restatement of Torts and approved by the California Supreme Court. Since the Government was engaged in an ultrahazardous activity it is liable to Appellant under the law of the State of California, on a theory of absolute liability.

4. Any Act Giving Rise to Tort Liability Under the Law of the Place Where the Act Occurred Is a "Negligent or Wrongful Act" Within the Meaning of the Tort Claims Act.

The Government argued in the District Court that the doctrine of liability without fault was not applicable under the Tort Claims Act; that the Government was liable only for its negligent or wrongful acts, and that an act giving rise to liability without fault could not be considered a negligent or wrongful act. Under the first three points of our argument here we have set forth three separate theories under any one of which the California Courts would hold the Government liable to Appellant. We now contend that regardless of the theory upon which the California Courts would predicate liability, the act of the Government in shooting down the drone plane over Appellant's property must be considered a negligent or wrongful act.

The pertinent provisions of Sections 1346(b) and 2674 [Appendix] are as follows:

1346(b) “* * * the district courts * * * shall have exclusive jurisdiction of civil actions * * * for money damages * * * for injury or loss of property * * * caused by the *negligent or wrongful act* or omission of any employee of the Government * * * *under circumstances where the United States, if a private person, would be liable* * * * *in accordance with the law of the place where the act or omission occurred.*” (Emphasis added.)

2674 “The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *.”

Appellant is asserting a claim for money damages for injury to property. As shown by the first three points of our argument, the United States, if a private person, would be liable in accordance with the law of the place where the act occurred. Hence, if the act complained of (the shooting down of a drone plane over Appellant’s property) is a negligent or wrongful act, the United States is liable to Appellant.

This Court then is called upon to determine the meaning of the words “negligent or wrongful act” as those words are used in Section 1346(b).

Section 1346(b) is a broad waiver of sovereign immunity of the United States with respect to the ordinary run of tort claims. Its purpose was to relieve Congress of burdensome consideration of private bills. (*State Farm Mut. Liability Ins. Co. v. U. S.*, 172 F. 2d 737; *United States v. Campbell*, 172 F. 2d 500; *Perucki v. U.*

S., 80 Fed. Supp. 959.) It should be construed to give effect to its purpose.

That the words “negligent or wrongful act” should not be construed in such a manner as to exclude the act complained of is shown by the words of this Court in *Employers’ Fire Insurance Co. v. United States*, 167 F. 2d 655, 657:

“The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule cannot be had in order to enlarge the exceptions.”

Two recent United States Supreme Court cases make it abundantly clear that resort to rule of strict construction cannot be had in order to limit the clear and sweeping waiver of immunity of the United States from suit on tort claims. (*United States v. Aetna Casualty & Surety Co.*, 338 U. S. 366; *United States v. Yellow Cab Co.*, 340 U. S. 543.)

We believe that the words “negligent or wrongful act,” as used in Section 1346(b), are broad and comprehensive enough to encompass any act which gives rise to a claim sounding in tort; that in using those words Congress intended to include all tort claims. The real limitation found in Section 1346(b) is that the claim shall be for money damages for injury to person or property. With the exceptions noted in Section 2680, none of which are applicable here, Congress intended that *all* claims for money damages for injury to person or property should

be actionable under the Tort Claims Act if actionable under local law.

Our belief is substantiated by the words of Judge Medina in *Niagara Fire Ins. Co. v. United States*, 76 Fed. Supp. 850, 855. Speaking of the "central core of meaning" of the Tort Claims Act, he said:

"The liability of the United States is not defined by the first sentence [now Section 1346(b)] nor is the jurisdiction conferred by the second [now Section 2674]; but the central core of meaning is the same in each, namely, that where the United States would be liable for damage or loss of property or on account of personal injury or death, if it were a private person, then in those cases, with the exceptions noted in Section 943 [now Section 2680], the person in whose favor such liability accrues may sue and recover in the proper District Court."

Those words indicate that Court would hold the Government liable under the Tort Claims Act in all cases, except those mentioned in Section 2680, where it would be liable under local law for injury to person or property.

For a recent Tort Claims case which indicates that the theory upon which liability under state law is based is immaterial, we respectfully direct the Court's attention to *Ure v. United States*, 93 Fed. Supp. 779. There, plaintiff's lands were flooded when a break occurred in an irrigation canal operated by the Government. The Court discussed three theories of liability; first, absolute liability imposed when one controls a dangerous force which escapes and does injury; second, absolute liability where one voluntarily sets in motion a physical body which invades the land of another; third, negligence where one dealing

with a potentially dangerous instrumentality fails to use the highest degree of care. The Court concluded that under the law of the place where the act occurred the Government would be liable under any one of those theories. It *held* that the state court would apply a rule of absolute liability and that the Government was liable under the Tort Claims Act.

We also respectfully direct the Court's attention to the case of *Feres v. United States*, 340 U. S. 135. At page 140 the United States Supreme Court says:

"Looking to the details of the Act, it is true that it provides, broadly, that the District Court 'shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * *.' *This confers jurisdiction to render judgment upon all such claims.* But it does not say that all such claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as a matter of law as much as to adjudge that liability exists. We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune to suit before; *it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law.*

"*For this purpose, the Act goes on to prescribe the test of allowable claims, which is, 'The United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances * * *' with certain exceptions not material here. 28 U. S. C. Sec. 2674, 28 U. S. C. A. Sec. 2674. It will be seen that this is not the creation of new causes of action, but acceptance of liability under circumstances that would bring private liability into existence.'* (Emphasis added.)

We submit that the correct rule should be, and is, that any act giving rise to tort liability under local law is a "negligent or wrongful act" within the meaning of the Tort Claims Act; that the theory upon which liability is predicated is immaterial.

Conclusion.

For the reasons set forth above, Appellant respectfully submits that the judgment of the District Court should be reversed and the cause remanded with instructions that judgment be entered in favor of Appellant.

Respectfully submitted,

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APPENDIX.

(1) United States Code Annotated, Title 28, Sec. 1346(b):

“Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

(2) United States Code Annotated, Title 28, Sec. 2674:

“Liability of United States

“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

“If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual

or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.”

(3) United States Code Annotated, Title 28, Sec. 2680:

“Exceptions

“The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administer-

ing the provisions of Sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Railroad Company. June 25, 1948, c. 646, 62 Stat. 984, amended July 16, 1949, c. 340, 63 Stat. 444."

No. 13059

**In the United States Court of Appeals
for the Ninth Circuit**

CALIFORNIA ELECTRIC POWER COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION**

BRIEF FOR THE UNITED STATES

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JURISDICTION

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¹ The Federal Tort Claims Act (Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U. S. C. 921 *et seq.*) was repealed, but its provisions were reenacted into law under the revision of the Judicial Code as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680, effective September 1, 1948 (62 Stat. 683, 862).

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JURISDICTION

The jurisdiction of the district court was invoked by appellant under 28 U. S. C. 1346 (b), formerly part of the Federal Tort Claims Act¹ (R. 1). This Court's jurisdiction rests upon 28 U. S. C. 1291 by reason of a notice of appeal, filed July 18, 1951, from a judgment in favor of the United States entered on June 28, 1951 (R. 16).

¹ The Federal Tort Claims Act (Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U. S. C. 921 *et seq.*) was repealed, but its provisions were reenacted into law under the revision of the Judicial Code as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680, effective September 1, 1948 (62 Stat. 683, 862).

STATEMENT

California Electric Power Company instituted this action against the United States under the Federal Tort Claims Act to recover damages caused to its electric transmission line by the crash of a Navy target plane (R. 3-5). The complaint was based on two causes of action: (1) trespass, "on the theory that the [United States] was engaged in ultrahazardous activities," as to which the "doctrine of liability without fault" was relied upon (R. 19, 77-79) and (2) negligence, inferable through the doctrine of *res ipsa loquitur* (R. 28, 76).

It was undisputed that the crash occurred on March 8, 1950, that the Navy target plane was shot down by Navy pilots engaged in air gunnery exercises over the Chocolate Mountain Gunnery Range, and that the portion of appellant's transmission line which was damaged was located within that Range (R. 20-21). The United States denied, however, that the crash constituted a trespass or that it resulted from negligence on the part of any Government employee (R. 7, 8, 28, 29).

At the trial, appellant introduced evidence on the question of damages, then rested (R. 23-27). The Government moved to dismiss the complaint as to both causes of action on the ground (1) that the theory of trespass liability without fault did not apply and (2) that appellant had failed to establish any negligence, and that the facts did not warrant application of *res ipsa* doctrine (R. 27, 33). This motion was denied without prejudice (R. 35). The

district court also specifically ruled that the doctrine of *res ipsa* “does apply in this case” (R. 35, 87).

The evidence for the United States showed:

1. *Extent and Remoteness of Area Within the Gunnery Range.*—The Chocolate Mountain Gunnery Range was 70 miles in length and 27 miles in width (R. 43). It “was in a remote part of” California with “no habitation around that could be affected by the [gunnery] practice” for which it was used (R. 4, 90). The land within the Range had “been condemned by the United States as part of the war effort,” and was located “out in an isolated region selected because of its remoteness from habitation or population” (R. 89, 90). Appellant’s transmission line right-of-way across the Range had apparently not been condemned. The right-of-way constituted “a very narrow strip as compared with the extent of the terrain [in the Range] that [was] used for training purposes” (R. 89).

2. *Crash of Target Plane Within the Gunnery Range.*—(a) On the day of the crash, several Navy planes were firing at the target plane, which was pilotless and operated by means of radio controls in two other Navy planes (R. 40-41). The mission of the planes in the firing group was to hit and shoot down the target plane (R. 43, 50-51).² The pilots

² If the firing group “failed in the marksmanship test” the target plane “is returned and landed at the home base [by the control pilots] and used all over again” (R. 51). But usually, as in the instant case, the firing groups accomplished their mission and shot down the target plane. In only a “small percentage” of cases do the control pilots bring the target plane back (R. 57).

in the two control planes directed the flight of the target plane at an 8000 foot elevation until they reached the center of the Range, where the target plane was hit by the planes in the firing group (R. 38, 55, 73). The target plane, in accord with the routine practice, was allowed to crash to the ground within the Range (R. 42-43). It was only when it appeared that the target plane would not crash within the Range but would "head towards the boundary of the area" that it was customary for the pilots in the control planes to "charge [their] guns and pull up close enough to the [target] plane" to "shoot it down" within the Range and thus prevent it from crashing beyond the remote region in which the Range was located (R. 42, 43, 56). Since the target plane, on the day in question, was hit and went "into a deep spiral," about 4 or 5 miles wide, "in the center" of the Range, there "was not much reason for [the control pilots] trying to" shoot it down (R. 38, 43, 44, 72). This was "the same ordinary procedure" followed before on "many, many occasions" (R. 45, 59, 64, 70).

(b) Even if there had been any reason for the control pilots to attempt to direct the course of the target plane after it was struck, there "was no way whatsoever" that could have been accomplished (R. 52). Prior to takeoff, careful inspection showed that the radio equipment in the target plane was "in perfect condition" (R. 71). But that equipment had been destroyed when struck by the firing group and the control pilots could no longer thereafter direct the target plane's flight (R. 61).

(c) The control pilots, who were also flying at an 8,000-foot altitude at the time the target plane was struck, did not see the electric transmission line from that altitude (R. 46). It would have been "impossible" to see the line from such a height even if the pilots had been looking for the line instead of concentrating on the flight of the target plane (R. 46, 68, 90). It was only when the pilots went down "clear to the ground" to investigate the crash that the line was first noticed (R. 44, 49). That was "the first time" the control pilots "realized [the] power lines were there" (R. 49). The pilots had been briefed before the mission but the presence of the power line had not been pointed out to them (R. 45). They had seen a map of the area, however, and knew that the power line was "perpendicular to the left of the range approximately halfway up" (R. 46-47, 57). Satisfactory firing missions could be accomplished only by use of the entire area over the Range, including that over the power line (R. 47, 62). For that reason, the orders to the firing groups permitted them to shoot down the target plane "within any place" in the Range (R. 60).

After introducing the evidence, the United States renewed its motion to dismiss the complaint, reasserting that neither the trespass theory of liability without fault nor the doctrine of *res ipsa loquitur* is applicable and that appellant had failed to establish any negligence on the part of any government employee (R. 74). The motion was again denied "without prejudice to the determination of the case on the

minutes" (R. 75). And, after carefully reviewing and appraising the facts (R. 87-92), the district court ruled that while the doctrine of *res ipsa loquitur* applied, the United States had "overcome any presumption or inference of carelessness or negligence created by said doctrine" (R. 13). The court further found that the crash of the target plane did not constitute a trespass for which the United States could be held liable (R. 11). Judgment was accordingly entered in favor of the United States (R. 15).

QUESTIONS PRESENTED

1. Whether the district court's finding that there was no negligence on the part of any government employee is clearly erroneous.

2. Whether a claim for damages based on the trespass theory of liability without fault is actionable under the Federal Tort Claims Act which permits suit only on claims founded on a *respondeat superior* liability.

STATUTES INVOLVED

1. Sections 1346 (b) and 2674 of Title 28, United States Code [formerly provisions of the Federal Tort Claims Act],³ provide in pertinent part:

SECTION 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court

³ See footnote 1, *supra*, p. 1.

of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

SECTION 2674. *Liability of United States.*—The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. Other sections of the Federal Tort Claims Act, as originally enacted (60 Stat. 842, 28 U. S. C. 931), provided in pertinent part:

SEC. 424. (a) All provisions of law authorizing any Federal agency to consider, ascertain, adjust, or determine claims on account of damage to or loss of property, or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, are hereby repealed in respect of claims cognizable under part 2 of this title and accruing on and after January 1, 1945, including, but without

limitation, the provisions granting such authorization now contained in the following laws:

* * * * *

Public Law Numbered 112, as amended, seventy-eighth Congress, approved July 3, 1943 (57 Stat. 372; U. S. C., title 31, secs. 223b, 223c, and 223d).

* * * * *

(b) Nothing contained herein shall be deemed to repeal any provision of law authorizing any Federal agency to consider, ascertain, adjust, settle, determine, or pay any claim on account of damage to or loss of property or on account of personal injury or death, in cases in which such damage, loss, injury, or death was not caused by any negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, or any other claim not cognizable under part 2 of this title.

ARGUMENT

Neither of the two causes of action alleged in this litigation warrant recovery of damages against the United States under the Federal Tort Claims Act.

The district court found that there was no negligence on the part of any government employee and that the crash was therefore not the proximate result of any such negligence. This finding is not clearly erroneous. To the contrary, it is supported by an abundance of substantial evidence. Accordingly, as we show in Point I, the district court properly refused to award damages on the negligence cause of action asserted by appellant.

The second cause of action, based on the trespass theory of liability without fault, is not available in this case under California law, as shown by Point II, *infra*, pp. 15-18. Moreover, even if the facts and law warranted imposition of liability without fault under California law as against a private airplane owner, it is our position that that theory of liability affords no basis for relief under the Federal Tort Claims Act. In this connection, we point out that the language of the Act and all pertinent decisions demonstrate that the only type of liability cognizable thereunder is a *respondeat superior* liability; that the trespass or liability without fault theory is a liability having no relationship to the *respondeat superior* type of liability; and that it therefore is not a permissible basis for recovery of damages under the Federal Tort Claims Act.

Although no relief is available under the Federal Tort Claims Act, that does not mean that an innocent landowner whose property is damaged because of the nonnegligent crash of military aircraft is left remediless against the United States. In Point III, we show that in the Military Claims Act Congress has provided a comprehensive system of relief for damage claims arising out of the operation of military aircraft and based on the theory of liability without fault. The existence and availability of this remedy is by itself, we submit, sufficient to preclude the granting of alternative relief under the Federal Tort Claims Act. Here, the need for limiting the claimant to the Military Claims Act remedy is underscored by the language of the Tort Act which requires exclusion

from its coverage of claims cognizable under the Military Claims Act.

I

The district court's finding that there was no negligence is not clearly erroneous and may not therefore be set aside on appeal

At the trial, as noted *supra*, p. 2, appellant introduced no evidence to establish negligence on the part of any government employee. The district court nevertheless refused to dismiss the negligence cause of action when appellant rested, ruling that the doctrine of *res ipsa loquitur* applied and created an inference of negligence. We do not agree that the facts of this case warrant application of the *res ipsa* doctrine. However, even if it is assumed that *res ipsa* was properly invoked by the district court, it is clear that where the defendant, as here, presents direct evidence contradicting the inference of negligence arising from *res ipsa*, "the issue is one of fact" for determination by a finding of the jury or by a finding of the judge in a nonjury case. *Rayl v. Syndicate Building Co.*, 118 Cal. App. 396, 398, 5 Pac. 2d 476, 477. This Court has itself recognized that under California law the question of negligence is "one of fact for the determination of the trier of facts" and that it is immaterial whether the determination is "derived from undisputed facts" or from "conflicting testimony." *United States v. Fotopulos*, 180 F. 2d 631, 636. See also *Wahlgren V. Market Street Railway Co.*, 132 Cal. 656, 663, 62 Pac. 308; *Tuttle v. Crawford*, 8 Cal. 2d 126, 131-

132, 63 Pac. 2d 1128; *Davidson Steamship Co. v. United States*, 205 U. S. 187, 190–191.

The trial judge's finding of fact in the instant case was that no agent, servant or employee of the United States was negligent and that the crash did not, therefore, result from "any negligence or carelessness on the part of [the United States] or any of its agents, servants and/or employees." (Finding of Fact II, R. 12.) Such a finding by the trier of facts, who observed the witnesses, appraised their credibility, determined the weight to be given to their testimony and drew inferences from the facts established, must, as this Court has stated, be sustained on appeal unless clearly erroneous. *United States v. Fotopulos*, 180 F. 2d 631, 634; Rule 52, Federal Rules of Civil Procedure; see also *Butte & Superior Copper Co. v. Clark-Montana Realty Co.*, 248 Fed. 609, 616 (C. A. 9), affirmed 249 U. S. 12, 30.

The evidence introduced by the Government makes it obvious that the finding of fact here involved is not clearly erroneous. That evidence, we submit, abundantly justifies the finding made by the trial court. Appellant, in fact, concedes that the evidence showed that the control pilots "exercised due care in following out their orders" and "did not negligently" let the target out of control. Appellant's Opening Brief, p. 11.⁴ Nor was there any negligence in allow-

⁴ Despite this concession, appellant would impute negligence to the control pilots by asserting that "no attempt was made to destroy or cause the drone to crash in a spot other than where it was headed. Consequently, appellee intended the drone to crash just where it did." Appellant's Opening Brief, pp. 13–14. However, as carefully explained in the evidence, destruction of the tar-

ing the firing groups to shoot down the target anywhere within the confines of the Range. The evidence established that the Range covered a remote and isolated area, 70 miles long and 27 miles wide and that the power line constituted "a very narrow strip" running midway across the Range. This narrow strip, when "compared with the extent of the terrain" makes it apparent that it was not reasonable to expect that a target, upon being hit, would have crashed into the narrow strip (R. 89). Moreover, satisfactory firing missions could be accomplished only by using the entire area over the Range, including that over the narrow strip (R. 43, 46-47, 62). The evidence also showed that it was impossible to see the power line from the 8,000-foot altitude at which the planes were firing; that the target plane, immediately after it was struck, went into a spiral about 4 or 5 miles wide before hitting the power line; and that the control pilots first saw that line only after they had gone "clear to the ground."

get plane would not have resulted in its disintegration in the air. "When you destroy it, it doesn't disintegrate in the air. You merely stop" the target from progressing in order to make sure that it crashes within the confines of the range (R. 56). Thus, even if the control pilots had "destroyed" the target plane, it would have meant doing no more than what the pilots in the firing group had already done—that is to shoot down the target plane within the range. In addition, since the radio equipment in the drone was damaged when hit by the planes in the firing group, the control pilots could no longer thereafter direct the course of flight of the target plane (R. 61). Furthermore, since the control pilots were flying at an eight thousand foot altitude and could not see the power line from that height (R. 46), it is difficult to understand appellant's contention that they "intended the drone to crash just where it did," *i. e.*, into the power line.

In appraising the foregoing evidence, the court below stated that it “could not find anything here that would justify” a finding that the government employees “did anything recklessly or carelessly or negligently” (R. 91). That evidence, the court further observed, could not, “even under the application of *res ipsa loquitur*” justify a finding of negligence (R. 92). To the contrary, that evidence fully sustains the trial court’s finding that no government employee was negligent. Since that finding is not therefore clearly erroneous, it may not be upset on appeal.

II

The trespass theory of liability without fault, inapplicable here as a matter of California law, affords no basis for recovery of damages under the Federal Tort Claims Act

There also was no error committed by the court below in rejecting appellant’s other cause of action—that based on the trespass theory of liability without fault. This theory of liability has been rejected by California law as far as airplane crashes are concerned. In any event, it affords no basis for relief under the Federal Tort Claims Act.

A. California law, in accord with most other jurisdictions, does not consider aviation an extrahazardous activity for which there is absolute liability

In urging the trespass theory of liability without fault, appellant relies primarily on “the theory that the defendant here was engaged in ultrahazardous activities” (R. 19). That theory, appellant points out, is set forth in the *Restatement of Torts* and has been recognized by the California Supreme Court.

The Government, it further argues, should therefore have been held liable here "under the law of the State of California, on a theory of absolute liability." Appellant's Opening Brief, p. 16.

The doctrine that a person engaging in an extra-hazardous activity is liable for damages resulting from that activity even in the absence of any negligent or intentionally wrongful act, stems from the famous English case of *Fletcher v. Rylands*, L. R. 1 Ex. 265 (1866), affirmed, L. R. 3 H. L. 330 (1868).⁵ There can be no doubt that the doctrine is asserted in the *Restatement of Torts*, which apparently used the *Rylands* case in formulating its rule to regulate liability for activities too dangerous to be governed by the general law of negligence yet too useful to be penalized as a nuisance. Recognizing the general rule that there is no liability for an "unintentional and nonnegligent" invasion of property even where harm results,⁶ the *Restatement* announces a single

⁵ Water from defendant's reservoir burst through an ancient filled-up mineshaft and flooded plaintiff's adjacent mine. Although defendant's contractor had been negligent in constructing the reservoir, this negligence was not imputed to defendants. Instead, the Court of Exchequer imposed liability on the ground "that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." On appeal, the opinions in the House of Lords limited use of the rule to situations involving a "nonnatural" use of the land.

⁶ Reliance on the extrahazardous activity theory of liability necessarily assumes that the trespass was neither negligent nor intentional. Section 166 of the *Restatement* declares: "Except where the actor is engaged in an extrahazardous activity, an unintentional and nonnegligent entry on land in the possession of

class of exceptions for so-called ultrahazardous activities. Section 519 states that

* * * one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable mis-carriage of the activity for harm resulting there-to from that which makes the activity ultra-hazardous, although the utmost care is ex-ercised to prevent the harm.

Section 520 goes on to define an activity as ultra-hazardous if it—

(a) Necessarily involves a risk of serious harm to the person, land, or chattels of others which cannot be eliminated by the exercise of the utmost care, and

(b) Is not a matter of common usage.

Finally, *Comment b* to Section 520 cites aviation as one of the ultrahazardous activities to which the special rule applies “because even the best constructed and maintained aeroplane is so incapable of complete control that flying creates a risk that the plane even though carefully constructed, maintained, and operated, may crash to the injury of persons, structures, and chattels on the land over which the flight is made.”

There also is no doubt that this special rule of liability for ultrahazardous activities has been applied to certain kinds of activity in California. See

another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest.”

Luthringer v. Moore, 31 Cal. 2d 489, 190 Pac. 2d 1 (fumigator held absolutely liable for injuries caused by escape of lethal hydrocyanic gases); *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 Pac. 952 (oil well driller held absolutely liable for damages caused by "blow out" due to gas pressure accumulation). But it is significant that this absolute liability theory has been expressly rejected by the courts of California as far as airplane crashes are concerned. Thus, in *Johnson v. Central Aviation Corp.*, 103 Adv. Cal. App. 125, 133-134, 229 Pac. 2d 114, 120, the court recently noted that "formerly" aviation was considered an "ultrahazardous activity" as to which "many states did impose absolute liability." "However," the court pointed out, "this view has come to be modified and now * * * under the more modern view" adopted in California the ordinary standards of due care apply. *Ibid.*

The doctrine of absolute liability for airplane crashes has been rejected not only by the California courts, but by its legislature as well. This is made apparent by comparison of the provisions of the State Aeronautics Act with those in the Uniform Aeronautics Act. The latter Act, in addition to declaring airspace a public highway and providing for the lawfulness of flight over the land of others, follows the *Restatement* rule and imposes absolute liability on the owner of every aircraft operated over land for injuries to persons or property on the land "whether such owner was negligent or not." 11 Uniform Laws Annotated, Sec. 5. The California Aeronautics Act adopts all of the provisions of the Uniform Act deal-

ing with the lawfulness of flight and use of airspace as a public highway. Cf. Deering, *General Laws of California*, Art. 151a, Sections 2 (b), (c), (d) and (g) with Sections 2, 3, 4 and 6 of the Uniform Act. But the California legislature deliberately refused to adopt Section 5 of the Uniform Act which, like the *Restatement* rule, would have imposed absolute liability on the owner of the plane. Consequently, the general tests of negligence and "want of ordinary care or skill"⁷ also furnish "the basis for fixing liability * * * for accidents resulting from the operation of aircraft" in that State. Opinion of the Attorney General of California, 2 C. C. H. Aviation Law Reporter, par. 23055 (1948). The law in California with respect to airplane crashes is no different than the law applying to automobile accidents. In both instances, there is no liability in the absence of a deliberate or negligent tort.⁸

Since the California courts and legislature have expressly rejected the absolute liability theory with respect to airplane crashes,⁹ we submit that the court

⁷ See Deering, *California Civil Code* (1949), Section 1714.

⁸ Even with respect to liability for injuries to a guest, the law in California is exactly the same for airplane and automobile accidents. Cf. Deering, *General Laws of California*, Art. 151a, Section 15 with California Motor Vehicle Code, Section 403.

⁹ In other jurisdictions, there appears to be only a single decision, rendered by a lower New York court in 1933, which has held aviation to be an ultrahazardous activity and awarded damages to a landowner on this theory for losses caused by a crashing airplane. *Rochester Gas & Electric Corp. v. Dunlop*, 148 Misc. 849, 266 N. Y. Supp. 469. In the court below, appellant stressed the fact that its "position in this case is very well stated by the Court in [the] *Rochester Gas*" case (R. 79). However, none of the many reported cases involving airplane crashes since *Rochester Gas &*

below properly rejected that theory in refusing to hold the United States liable under the Tort Claims Act which requires determination of the Government's liability "in accordance with the law of the place where the act or omission occurred." Section 1346 (b), *supra*, p. 7.¹⁰

B. The Absolute Liability Without Fault Theory Affords No Basis for Recovery Under the Federal Tort Claims Act

Even if the facts of this case warranted a holding that the airplane crash resulted from the miscarriage of an extrahazardous activity as to which liability without fault could be imposed under California law, it is our position that that type of liability is not cognizable under the Federal Tort Claims Act and may

Electric Corp. v. Dunlop, supra, has followed that decision in affixing liability on the theory that an airplane is an ultrahazardous instrumentality. On the contrary, where the notion of such liability has been considered at all, it has been rejected. See *Kadylak v. O'Brien*, 1941 U. S. App. Rep. 8 (U. S. D. C., W. D. Pa.); *Herrick and Olsen v. Curtiss*, 1932 U. S. App. Rep. 110, 113, 117, 118, 122, 131 (N. Y. Sup. Ct., Nassau Co.); Rhyne, *Aviation Accident Law* (1947), pp. 64-5.

It is also significant that this notion of absolute liability for airplane crashes has also been rejected by the Commissioners on Uniform State Laws, who, in 1943, withdrew the Uniform Aeronautics Act from the list of those recommended to the States for adoption. See 11 Uniform Laws Annotated, Cum. Supp. (1949), p. 11. And the members of the "American Law Institute, feeling that the rules stated in the *Restatement*" of Torts concerning absolute liability for airplane crashes "were undesirable * * *, decided to cooperate as early as 1938 with" the Uniform Commissioners in drafting a proposed act based on negligence rather than absolute liability. Handbook of the National Conference of Commissioners on Uniform State Laws (1938) p. 71; *id.* (1948) p. 147, 149.

¹⁰ The crash giving rise to this action occurred in California and it is undisputed that the law of that state therefore applies.

not therefore be invoked as a basis for recovery of damages.

1. Under the Federal Tort Claims Act, the United States has assumed liability for the negligent or wrongful act of "any employee of the Government while acting within the scope of his office or employment" to the same extent that "a private individual" would be liable. Section 1346 (b), *supra*, p. 7. There can no longer be any doubt that this language incorporates into the Federal Tort Claims Act the common law test of *respondeat superior* for the purpose of determining whether the United States is to be held liable under that Act. The Court of Appeals for the Fifth Circuit, in *United States v. Campbell*, 172 F. 2d 500, 503, certiorari denied, 337 U. S. 597, stated that—

the whole structure and content of the Federal Tort Claims Act makes it crystal clear that in enacting it and thus subjecting the Government to suit in tort the *Congress was undertaking with the greatest precision to measure and limit the liability of the Government under the doctrine of respondeat superior*. [Italics supplied.]

The Court of Appeals for the Fourth Circuit, expressly referring to the quoted language, stated that it was "in thorough accord with both the reasoning and the conclusion of the [Campbell] opinion." *United States v. Eleazer*, 177 F. 2d 914, 918, certiorari denied, 339 U. S. 903. Accord: *United States v. Sharpe*, 189 F. 2d 239 (C. A. 4); *Rutherford v. United States*, 73 F. Supp. 867 (E. D. Tenn.), affirmed, per

curiam, 168 F. 2d 70 (C. A. 6); *Cropper v. United States*, 81 F. Supp. 81 (D. C. Fla.); *Long v. United States*, 78 F. Supp. 35 (D. C. Cal.).

Respondeat superior liability is a vicarious or derivative liability. Under it, the United States may "not be held liable under the substantive law unless the servant may also be held liable thereunder." *Kendrick v. United States*, 82 F. Supp. 430, 432 (D. C. Ala.); *Precht v. United States*, 84 F. Supp. 889 (D. C. N. Y.). If the employee is free from civil liability, it is obvious that under the *respondeat superior* principle "his employer must also be entitled to a like immunity." *N. O. & N. E. Railroad Company v. Jopes*, 142 U. S. 18, 24; *Cromelin v. United States*, 177 F. 2d 275 (C. A. 5), certiorari denied, 339 U. S. 944. The master's responsibility under *respondeat superior*, as recognized in a recent California decision, "is dependent on the injured person's right to recover against the employee." *Popejoy v. Hannon*, 37 Adv. Cal. 176, 189, 231 Pac. 2d 484. *Respondeat superior* means no more than that the master must answer for a tort for which the servant himself is legally responsible to the person injured. The doctrine presupposes that the employee has violated a duty to that person, exposing himself to personal liability. The master's liability under *respondeat superior* attaches not because the master has violated some duty to the injured person, but simply because the master is secondarily liable for violation of the duty owed by the employee. It is only because the employer has violated no duty to the plaintiff that the employer, who has been held liable in damages under *respondeat superior*, may

recover those damages from the employee who did violate a duty to the plaintiff. This right to indemnity exists because the payment of damages by the employer, the person secondarily liable, leaves him with a right to secure restitution from the employee, the person primarily liable. See, *e. g.*, *Imperial Refining Co. v. Kanotex Refining Co.*, 29 F. 2d 193, 201 (C. A. 8). Where the employer is held liable in damages “under the doctrine of *respondeat superior*,” he is entitled to indemnity because “in such a case [the employer] is guilty of no wrongdoing but simply has the misfortune to be legally responsible for the wrongdoing of another.” *Hendrix v. Employers Mut. Liability Ins. Co.*, 98 F. Supp. 84, 87 (D. C. S. Car.).

The Tort Claims Act, in other words, does not make the United States unqualifiedly liable in tort. It makes the United States liable in tort only where the employee himself is legally liable to the person injured. It is only with respect to such a claim that the Government consented to be liable “in the same manner and to the same extent as a private individual under like circumstances.” Section 1346 (b), *supra*, p. 7. Unless the claim is based on a *respondeat superior* liability—that is, a claim for which the employee himself would be personally liable—the claim does not come within the waiver effected by the Tort Claims Act and the equating of the Government with a private individual respecting claims which are covered by the waiver does not begin to operate and is of no help to appellant here. Whether the absolute liability theory urged by appellant is a

respondeat superior liability is critical. To that question we now turn.

2. The liability for losses caused by an ultrahazardous instrumentality is imposed, not because an employee has committed a "negligent or wrongful act" for which he may be held liable to the injured person, but because the instrumentality involved is one which, despite the exercise of all due care, poses a likelihood of injury. Where an employer decides to engage in an extrahazardous activity he becomes liable for the nature of his *activity*. He assumes as part of his business expenses the additional burden of meeting the cost of damages which will inevitably follow simply because he is engaged in that activity, even though it is conducted with all possible care. His employees, on the other hand, are not liable for the nature of their employer's activity; their liability, unlike that of the employer, is predicated only *on the manner* in which they perform the activity. If they act negligently or commit a deliberate wrong, liability for that negligent or intentionally wrongful act may be imposed on them. If they commit no such act, there is no liability *on their part* even though the extrahazardous activity may necessarily result in damages for which their employer must respond. Since the extrahazardous liability theory presupposes that the employees act with all possible care, they themselves would not be subject to any liability if actions for damages were instituted against them. The employees' careful conduct immunizes them from personal liability and their employer may not, therefore, be held liable under the doctrine of *respondeat*

superior. His liability arises out of his decision to engage in the extrahazardous activity, regardless of how carefully his employees conduct that activity. It is a liability which stems from the policy judgment that activities involving the use of ultrahazardous instrumentalities "must be carried on at the risk of those interested in them and not at the risk of those without such interest * * *." Bohlen, *Aviation Under The Common Law*, 48 Harv. L. Rev. 216, 217 (1934). The liability placed upon the employer is thus direct and has no relationship to the *respondeat superior* doctrine.

3. Still other considerations show that the absolute liability without fault theory is not the type of *respondeat superior* liability cognizable under the Tort Claims Act. Absolute liability for plane operation is predicated on the liability of the owner without regard to the liability of the pilot. It is significant that even Section 5 of the Uniform Aeronautics Act, *supra*, p. 16, which, prior to its withdrawal in 1943,¹¹ adopted the absolute liability theory for airplane crashes, imposed such absolute liability only on the owner of the plane and specifically provided that the pilot himself could be held "liable only" for negligence. While the owner of the plane was absolutely liable without proof of negligence, the pilot himself could not be held liable unless he had been negligent. Therefore, under the liability without fault theory, even though the employee was not personally liable to the injured person, his employer, the owner of the plane, could be held absolutely liable. But this liability is ob-

¹¹ See footnote 9, *supra*, p. 18.

viously not the vicarious liability of an employer required to answer for the torts of his employee. It is a liability which arises out of ownership of the plane. It is a direct liability placed on the airplane owner as a responsibility of ownership. Plane ownership, rather than tortious conduct of an employee, is the *sine qua non* of such liability.

In this connection, it should be noted that since the *respondeat superior* relationship is essential to hold the United States liable under the Act, the fact that an automobile or truck involved in an accident was owned by the United States is insufficient to hold the Government liable even in those states where liability is an incident of ownership and is not dependent upon the use of such a vehicle in the owner's business. *Murphey v. United States*, 79 F. Supp. 925, 927-928 (N. D. Cal.), reversed on other grounds, 179 F. 2d 743 (C. A. 9); *Hubsch v. United States*, 174 F. 2d 7 (C. A. 5), writ of certiorari dismissed, 340 U. S. 804; *Fries v. United States*, 170 F. 2d 726 (C. A. 6), certiorari denied, 336 U. S. 954; *Williams v. United States*, 189 F. 2d 607 (C. A. 10); *Sanchez v. United States*, 177 F. 2d 452 (C. A. 10); *Glasgow v. United States*, 95 F. Supp. 213 (D. C. Ala). We submit that the rule should be no different where liability is predicated on ownership of a plane rather than on ownership of any other motor vehicle.

C. Comparison of the language of the Tort Claims Act with other statutes waiving governmental immunity supports our views

Other statutes allowing suit against the Government are cast in terms far more general than those employed in the Tort Claims Act and accordingly are

not limited to the *respondeat superior* type of liability.

1. The Suits in Admiralty Act provides that libels may be brought against the United States in cases where, if the government-owned merchant vessel were privately owned, "a proceeding in admiralty [could] be maintained", and further provides that such suits shall proceed and be heard and determined according to the principles of law obtaining in like cases between private parties. Section 2, 3, 41 Stat. 525, 46 U. S. C. 742, 743. The Public Vessels Act (43 Stat. 1112, 46 U. S. C. 781), incorporating the broad provisions of the Suits in Admiralty Act, allows the filing of a libel against the United States wherever the damages are caused by a public vessel. *American Stevedores v. Porello*, 330 U. S. 446, 452; *Thomason v. United States*, 184 F. 2d 105 (C. A. 9). Under both statutes, maintenance of suit is conditioned only upon a showing that "principles of admiralty law [would] impose liability on private parties." *Canadian Aviator Ltd. v. United States*, 324 U. S. 215, 224-225.

The reach of these two Acts is thus much broader than that of the Tort Claims Act. Unlike the latter Act, the two admiralty statutes are not limited to damages caused by an employee who himself would be personally liable for those damages. Therefore, under the admiralty statutes, the *respondeat superior* theory of liability, the theory of liability without fault, and any other theory of liability available against a private ship may be invoked as a basis for recovering damages. For example, it is well established in admiralty that a private shipoperator is absolutely liable for maintenance and cure regardless

of fault whenever a seaman is injured in the service of the ship. The seaman is entitled to these benefits despite the fact that there was no fault or negligence on the part of the shipowner or any of his employees. *Calmar S. S. Corp. v. Taylor*, 303 U. S. 525, 527; *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 730. This absolute liability may also be invoked against the United States because the two admiralty statutes are not limited to a *respondeat superior* liability. *Farrell v. United States*, 336 U. S. 511. For the same reasons, the absolute liability of a shipowner, irrespective of fault, for injuries caused by his vessel's unseaworthiness may be imposed upon the United States under the Public Vessels and Suits in Admiralty Acts. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 93-94; *Lauro v. United States*, 162 F. 2d 32, 34 (C. A. 2).

If the Federal Tort Claims Act had employed the same broad language as the admiralty statutes, there is no doubt that the absolute liability theory urged by appellant would be available to claimants under the Tort Claims Act. But the express use of such broad terminology in the admiralty statutes and its omission from the Tort Claims Act reinforces the conclusion that Congress carefully and deliberately limited the liability of the United States under the Tort Claims Act to cases based on the conventional *respondeat superior* liability.¹²

¹² Representative Lozier, in discussing one of the predecessor bills considered by Congress prior to enactment of the Tort Claims Act, referred to the liability provisions as "the application of the ancient rule in reference to the liability of the principal for the wrongful act of his agent in suits against the Government for negligence of its employees." 69 Cong. Rec. 2191. The bill under discussion, H. R. 9285, 70th Cong., covered claims "if the damage

2. The broad language of the British counterpart of our Federal Tort Claims Act compels the same conclusion. The Crown Proceedings Act of 1947 (10 and 11 Geo. 6, c. 44) announces a far broader consent to tort suit against the sovereign than does our Act. Section 2 (1) of the British Act provides (6 Halsbury's Eng. Stat. (2d ed.) 48):

Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject—

(a) In respect of torts committed by its servants or agents;

(b) In respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and

(c) In respect of any *breach of the duties attaching at common law to the ownership, occupation, possession or control of property*:

Provided, that no proceeding shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate * * *. [Italics supplied.]

or loss was caused by the negligence or wrongful act or omission of any officer or employee of the Government acting within the scope of his office or employment"—language practically the same as that now appearing in 28 U. S. C. 1346 (b) *supra*, p. 7. See also Senator Danaher's reference to the "application of the rule of *respondeat superior*" in discussing another bill which preceded the Act. Hearings before Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., on S. 2690, p. 44.

It is apparent that subsection (a) of this section, as qualified by the proviso, imposes on the Crown the same *respondeat superior* liability announced by the Federal Tort Claims Act. But, the British legislators, unlike our own, did not want to limit liability under their Act to *respondeat superior* liability. They wanted to impose on the Crown the absolute liability attaching to the ownership of certain property. And so they added subsection (c) to accomplish that result. Consequently, the express language of the Crown Proceedings Act makes available to claimants under that Act the theory of absolute liability arising out of ownership of an extrahazardous instrumentality.¹³ But the absence of any similar express provision in the Federal Tort Claims Act shows, we

¹³ Glanville L. Williams, author of *Crown Proceedings* (1948), emphasizes the point that Section 2 (1) (c) of the British Act "makes the Crown liable * * * under *Rylands v. Fletcher*," p. 46. As noted above, p. 14, the *Rylands* case was used as the basis for the liability without fault theory adopted by the *Restatement*.

Harry Street, Esq., of the Faculty of Law of Manchester University, England, also calls attention to Section 2 (1) (c) and shows that the absence of such a provision from the Federal Tort Claims Act is particularly significant. He states:

"The United States is liable under the act only for the 'negligent or wrongful act or omission of any employee.' Some torts, however, cannot be regarded as the act of the servant, but liability for them depends entirely on the ownership of the instrumentality causing the damage. For instance, when there is a liability for the carrying on of an ultrahazardous activity, no one servant is responsible; the tort is solely that of the owner of the instrumentality. Under the act it seems that the United States will not be liable for any such acts or omissions which cannot be attributed to an employee." Street, *Tort Liability Of The State: The Federal Tort Claims Act And The Crown Proceedings Act*, 47 Mich. L. Rev. 341, 350 (1949).

submit, that the court below properly refused to invoke that theory as a basis for allowing recovery against the United States.¹⁴

III

Applicability of the Military Claims Act precludes relief under the Federal Tort Claims Act

For the reasons already set forth, we believe that the court below properly dismissed this action under the Federal Tort Claims Act. That does not mean, however, that plaintiffs in an airplane crash of this sort—that is, one not involving any negligent or wrongful act on the part of a government employee—are left remediless. There is full relief available in such a case under the Military Claims Act. Indeed, the applicability of the relief provisions of that Act precludes the alternative relief here sought under the Federal Tort Claims Act.

Long before the Federal Tort Claims Act became law in 1946, Congress had recognized that military activities, particularly those involving aircraft operation, would result in personal injury and property damage to private persons. Thus, a 1922 statute made provision for administrative settlement of personal injury and property damage claims “resulting from

¹⁴ We agree with appellant that *Ure v. United States*, 93 F. Supp. 779 (D. C. Oreg.), adopts the view that the absolute liability theory may be invoked in actions under the Federal Tort Claims Act. However, we believe that the considerations set forth above, pages 18–29, show that the district judge erred in adopting that view. And, when a final judgment is entered in the *Ure* case, the Government contemplates taking an appeal to this Court in order to have that error corrected.

the operation of aircraft at home and abroad.” 42 Stat. 737, as amended, 56 Stat. 620; 31 U. S. C. 224. This statute was one of a series of many enactments passed by Congress between 1885 and 1942 dealing with the settlement of claims incident to noncombat military and naval activities. In 1943, Congress reviewed these numerous statutes under which a comprehensive system for settling such claims had been developed. See S. Rep. 243, 78th Cong., 1st sess. On July 3, 1943, the 1922 statute was consolidated with all of the other comprehensive statutes authorizing administrative settlement of claims incident to military activities. The consolidated statute is known as the Military Claims Act of 1943 (57 Stat. 372; 31 U. S. C. 223b). In 1945, in order “to provide the Navy with a system of laws for the settlement of claims uniform with that of the Army,” the Military Claims Act was made applicable to naval activities. 59 Stat. 662, 31 U. S. C. 223d. Under that Act, the Secretary of the Navy is authorized to consider, ascertain, adjust, determine and settle claims caused by non-combat naval activities. Payments under \$1,000 may be made directly by the Navy to the claimant. Administrative awards in excess of \$1,000 are reported to Congress (in the same manner as are judgments obtained against the United States under the Federal Tort Claims Act) for payment under regular or supplemental appropriation bills. See *infra*, p. 39.

A. The remedy under the Military Claims Act is exclusive

It is settled law that where Congress, over a long period of time and through a series of enactments, has legislated with respect to a particular subject

matter in such a manner as to create a complete and comprehensive system for dealing therewith, subsequent statutes of general application, which would otherwise apply, are held to be inapplicable to the special subject matter. *United States v. Barnes*, 222 U. S. 513, 520; *United States v. Sweet*, 245 U. S. 563; *Ozawa v. United States*, 260 U. S. 178, 193, 194; *United States v. Jefferson Electric Mfg. Company*, 291 U. S. 386, 396; *Missouri v. American Trucking Associations*, 310 U. S. 534, 544; *Townsend v. Little*, 109 U. S. 504, 512; *United States v. Fixico*, 115 F. 2d 389, 393 (C. A. 10); *Iriarte et al. v. United States*, 157 F. 2d 105, 108 (C. A. 1). It is equally settled that the foregoing rule is fully applicable in determining whether the Federal Tort Claims Act, concededly a statute of general application, is to be construed so as to authorize relief with respect to claims theretofore covered by a comprehensive administrative and statutory system. In *Feres v. United States*, 340 U. S. 135, 140, the Supreme Court held the Tort Claims Act inapplicable to claims by servicemen for service-incident injuries because a “comprehensive system of relief had [theretofore] been authorized for them and their dependents by [prior] statute.” Justice Jackson, speaking for a unanimous court, pointed out that—

The primary purpose of the [Federal Tort Claims] Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional (340 U. S. 135, 140).

Showing that that purpose would in no way be served by affording servicemen alternative relief under the Tort Claims Act, the opinion emphasizes the "bearing upon it [of] enactments by Congress which provide systems of simple, certain and uniform compensation." 340 U. S. 135, 144.

"By parity of reasoning" the "same result" was reached in *Lewis v. United States*, 190 F. 2d 22, 24 (C. A. D. C.), certiorari denied, No. 313, Oct. Term, 1951. There, as in the *Feres* case, a claim for damages under the Tort Claims Act was held to be barred by the claimant's eligibility for the benefits of prior statutes authorizing administrative relief. Identical considerations have compelled other courts considering various other types of legislation permitting suit against the United States to hold that the prior specific administrative remedy precludes alternative relief under the later statute authorizing suit. *Dobson v. United States*, 27 F. 2d 807 (C. A. 2), certiorari denied, 279 U. S. 653; *Bradey v. United States*, 151 F. 2d 742 (C. A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880; *Mandel v. United States*, 191 F. 2d 164 (C. A. 3); *Johansen v. United States*, 191 F. 2d 162 (C. A. 2).

B. The language of the Tort Claims Act confirms the exclusiveness of the Military Claims Act remedy

In holding the administrative remedy exclusive in the *Feres* and related cases the courts, as has been noted, relied on general principles of statutory interpretation. However, the need for holding the Military Claims Act remedy exclusive here is manifested not only by these general principles but by provisions

of the Federal Tort Claims Act itself. Congress in enacting the latter Act, took express note of the Military Claims Act and spelled out the exact spheres of operation of each of the two Acts.

Prior to the Tort Claims Act, the Military Claims Act was broad enough to cover claims based on (1) any wrongful act, whether intentional or negligent, and (2) acts which, though resulting in damage, were neither intentional nor negligent. Whether the damages were caused willfully, negligently or without fault on the part of the military employee was immaterial under the Military Claims Act. The fact that damages had been sustained was generally sufficient to warrant administrative approval of a claim under that Act. With the enactment of the Federal Tort Claims Act on August 2, 1946, a new remedy for damages caused by any wrongful act, whether intentional or negligent, was created.¹⁵ And Congress made

¹⁵ The Tort Claims Act covers damages resulting from the "negligent or wrongful" acts or omissions on the part of federal employees. Section 1346 (b), *supra*, p. 7. There is support in the legislative history of the Act for the view that the word "wrongful" was used as synonymous with "negligent" and that Congress never intended the Act to include anything other than negligent torts. Senator Danaher indicated that this was a natural interpretation of the phrase "negligent or wrongful" and prophesied that the courts would restrict the Act to tort cases arising solely from negligence. See Hearings Before the Subcommittee of the Senate Judiciary Committee on S. 2690, 76th Cong., 3d sess., p. 43. Moreover, language in pertinent committee reports shows that Congress was of the view that a tort was not "wrongful" unless it had been caused "negligently." Compare statement of Assistant Attorney General Shea using the phrase "*wrongful act or omission* on the part of any government agent" (Hearings Before the House Committee on Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d sess.) with the Judiciary

it clear, in enacting the Tort Claims Act, that the new remedy, within its sphere of operation, was not an alternative or supplemental remedy, but exclusive. It expressly provided that the new remedy for tort claims cognizable thereunder "shall be exclusive." Section 423, 60 Stat. 846. To make it doubly clear that there was to be no overlapping remedy, the Tort Claims Act specifically repealed the Military Claims Act of 1943 (including the extension of that Act to the Navy, as codified in 31 U. S. C. 223d) to the extent that the Military Claims Act formerly covered claims based on a government employee's wrongful conduct, whether intentional or negligent. See Section 424 (a), *supra*, p. 7.

The Tort Claims Act does not, however, apply to the second group of acts which were theretofore cognizable under the Military Claims Act, *i. e.*, those acts which, while resulting in damage, were neither negligent nor intentional. Since the Tort Claims Act does not cover these nonnegligent and unintentional acts and since Congress wanted to preserve the Military Claims Act's coverage as to these acts,

Committee's adoption of the same statement with only one change, *i. e.*, substituting the phrase "*negligence* on the part of any government agent" (H. Rep. 1287 on H. R. 181, 79th Cong., 1st sess.).

This case, however, does not require decision on the question as to whether the Act is limited to *negligent* acts. For, even if the word "wrongful" requires that the Act be extended beyond negligent torts, it can only mean that the Act also includes some torts which were *intentionally* caused, *i. e.*, those which are deliberately wrongful. In no event may a "wrongful act" be interpreted to include *activities* which in some states can impose liability without fault. Such a liability, as we have shown (*supra*, p. 22) is imposed because of the *nature* of the activity, not for the *manner* in which it is performed.

the Tort Claims Act provides that “nothing contained [t]herein shall be deemed to repeal” the Military Claims Act (or any other statute authorizing administrative settlements) with respect to cases in which the damage was caused by any nonnegligent and unintentional act. Sec. 424 (b) *supra*, p. 8. For such cases, the Military Claims Act (and similar legislation) remained the appropriate vehicle for relief.

Congress, in the Tort Claims Act, has therefore marked out the exact boundaries of that Act as well as the Military Claims Act: To the extent that the latter Act covered intentional or negligent wrongs it has been superseded by the Tort Claims Act. To the extent that the Military Claims Act covered non-negligent and unintentional acts it, rather than the Tort Claims Act, affords the only remedy.

C. Relief under the Military Claims Act has been awarded regularly to other claimants in airplane crash cases not resulting from a government employee's negligent or wrongful conduct

In view of the foregoing considerations, the Military Claims Act has been regularly invoked as the exclusive remedy for claimants who, like appellant here, have been damaged by the nonnegligent and unintentional crash of Navy and Air Force planes. See e. g. Sen. Doc. 215, 81st Cong., 2d sess., pp. 6-7, approving a claim for \$3,400 for damage caused by crash of naval aircraft; Sen. Doc. 15, 81st Cong., 1st sess., pp. 24-25, approving a claim for \$2,481.34 for damage caused by crash of naval aircraft; Sen. Doc. 227, 81st Cong., 2d sess., pp. 2-3, approving a claim of \$12,275.14 for damage caused by crash of an Air Force plane; *id.* at pp. 3-4, approving a claim for \$16,924.59 for

damage caused by crash of an Air Force plane; *id.* at pp. 4-5, approving a claim for \$11,240.93 for damage caused by crash of an Air Force plane; House Doc. 729, 81st Cong., 2d sess., p. 10, approving a claim of \$6,146.71 for damage caused by crash of an Air Force plane.

All of the damage claims described in the above-cited Senate and House Documents were approved and paid under the comprehensive relief provisions of the Military Claims Act. Since the damages sustained by appellant's power line similarly resulted from a nonnegligent and unintentional airplane crash, we submit that the appellant's only remedy is that prescribed in the Military Claims Act.¹⁶ The rule applied by the Supreme Court in the *Feres* case (*supra*, p. 31) and the express language of the Federal Tort Claims Act (*supra*, pp. 33-35) permit no other result.

D. The purpose of the Tort Claims Act is not served by extending its benefits to claims covered by the Military Claims Act

Two chief purposes motivated enactment of the Federal Tort Claims Act. First, it was designed to afford claimants a right to recover damages against the United States where formerly they had been remediless. We have already shown that this purpose would not be served by extending the benefits of the Tort Claims Act to the instant claim for which an effective remedy against the United States was

¹⁶ We are advised that a claim initially filed by appellant with the Navy Department was rejected by that Department. However, as shown in the copy of our letter to appellant reprinted in the Appendix, *infra*, pp. 41-43, the Navy Department has stated its willingness to consider appellant's claim under the Military Claims Act with a view to certifying it to Congress for appropriation.

available under the Military Claims Act long before the Tort Claims Act became law.

Similarly, limiting claimants to their remedy under the Military Claims Act does not conflict with the other purpose of the Tort Claims Act recognized by appellant, *i. e.*, to shift from Congress to the courts the burden of determining the merits of numerous tort claims against the United States. See Appellant's Opening Brief, p. 17-18. The title of the Act of August 2, 1946, in which the Federal Tort Claims Act appears as Title IV, states its purpose to be "to provide for the increased efficiency in the legislative branch of the Government" (60 Stat. 812). Title I of that Act relates in general to the procedural rules of the Senate and House (60 Stat. 831), describes the jurisdiction of the various Congressional Committees (60 Stat. 815 *et seq.*), and in Section 131 specifically prohibits the introduction of any private bill proposing to authorize the payment of money for property damages or for personal injury damages for which suit may be instituted under the Federal Tort Claims Act (60 Stat. 831). As indicated in the Title of the Act, its manifest purpose, together with the concurrent prohibition of introduction of private bills, was to promote the efficiency of Congress by eliminating a serious obstacle to its legislative activity (Rep. No. 1400 on S. 2177, 79th Cong., 2d sess., pp. 7, 29; 92 Cong. Rec., p. 10049).

This obstacle had arisen because Congress, prior to the Act of August 2, 1946, had been compelled to divert a considerable portion of its time and energies to the consideration of a mass of private laws mak-

ing individual awards to private parties damaged by acts of government employees. For example, in 1943 and 1944, thousands of bills were introduced in Congress to provide compensation for aggrieved individuals, and during those years Congress actually enacted hundreds of private laws to settle tort claims against the United States. See Holtzoff, *The Handling Of Tort Claims Against The Federal Government*, 9 Law and Contemporary Problems, 311, 322 (1942); Senate Report No. 1400, 79th Cong., 2d sess., p. 30. These special Acts did not require a great deal of consideration on the floor of the House and Senate, most of them being passed on consent calendars. But these acts did drain away from other problems the time and attention of the legislators representing the constituents in whose behalf the bills were introduced, and to a considerably greater extent, the time and attention of the legislators who sat on or appeared before committees having jurisdiction over claims. Hearings Before Joint Committee on Organization of Congress, 79th Cong., 1st Sess., March 1945, pp. 68, 95, 219.

The purpose of the Tort Claims Act in transferring this work-load from Congressional committees to the courts is in no way impeded by requiring claims of the instant type to be adjudicated under the Military Claims Act. Under that Act, the claimant applies to the appropriate administrative agency and submits all the necessary information. The agency then makes its own investigation, determines the merits of the claim and the amount to be awarded to the claimant. If the award is less than \$1,000, the agency makes direct payment. If the amount found due ex-

ceeds \$1,000, the agency reports the award to Congress for payment under a regular or supplemental appropriation. Even with respect to the awards which exceed \$1,000, no work-load is imposed on Congress. Congress does not re-investigate the claims for which awards are made under the Military Claims Act any more than it makes an independent examination of the merits of a judgment under the Federal Tort Claims Act. In fact, Congressional procedure with respect to Military Claims Act Awards is identical with its procedure in authorizing appropriations for judgments awarded by courts under the Tort Claims Act. In both instances, all that Congress does is make the formal appropriation. As shown by the Senate and House Documents cited *supra*, pp. 35-36, appropriations for judgments under the Tort Claims Act are submitted in the same requests and at the same time as appropriations for payments of claims administratively allowed under the Military Claims Act.

A procedure which merely requires the appropriation of money obviously does not impose upon Congress any of the cumbersome workload caused by the introduction and consideration of a mass of private bills. After introduction by the legislator, representing the claimant, these private bills were referred to either the House or Senate Committee on Claims which had to undertake time-consuming investigations and hearings so as to determine the merits of the claim and the proper amount payable to the claimant. The Tort Claims Act was intended to enable Congress to rid itself of this workload. That purpose is in no way interfered with when claims are administra-

tively allowed under the Military Claims Act and all that is left for Congress to do is to make the same sort of formal appropriation it provides for judgments awarded under the Tort Claims Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

HOLMES BALDRIDGE,
Assistant Attorney General.

ERNEST A. TOLIN,
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REUBEN ROSENSWEIZ,
Assistant United States Attorney.

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Attorneys, Department of Justice.

APPENDIX

(Copy)

UNITED STATES DEPARTMENT OF JUSTICE,
WASHINGTON 25, D. C., *October 30, 1951.*

AHB:MH
157-12-207

AIR MAIL

DONALD J. CARMAN, Esquire,
California Electric Power Company,
Riverside, California.

Re: California Electric Power Co. v. United States
(No. 13059, C. A. 9)

DEAR MR. CARMAN: I want to thank you for the copies of the record and your brief in the above case.

As you know, it has been our consistent position that the facts of this case, which fail to disclose any negligent or wrongful act on the part of government employees, preclude recovery under the Federal Tort Claims Act for the damages caused to your transmission line because of the crash of the Navy drone plane. The district court accepted our position and awarded judgment in our favor. If your appeal is prosecuted, we will strongly urge the Court of Appeals to accept our position and affirm the judgment.

However, while your claim for damages is not cognizable under the Tort Claims Act, it does appear appropriate for consideration by the Navy Depart-

ment under the Military Claims Act, as made applicable to the Navy by the Act of December 28, 1945 (31 U. S. C. 223d). The latter Act empowers the Navy to consider, approve, and report to Congress for payment claims which are in excess of \$1,000, and which, although caused by Navy noncombat activity, are not the result of any negligent or wrongful act on the part of a government employee acting within the scope of his employment. If the claim does result from such a negligent or wrongful act, then, unlike your claim, it is cognizable under the Federal Tort Claims Act and not the Military Claims Act.

I understand that your company filed a claim with the Navy department within the one-year period allowed by the Military Claims Act. The Navy Department has advised me that upon request from you it will be willing to consider your claim under the provisions of that Act with a view to certifying it to Congress for appropriation. In this connection, I want to point out that many other claims arising out of the crash of military airplanes not caused by any negligent or wrongful act of a government employee have been administratively approved and uniformly paid by congressional appropriation under the Military Claims Act. It is reasonable to expect, therefore, that your claim would receive the same favorable consideration.

If you decide to ask for such consideration under the Military Claims Act, please let me know at once and I will advise the Navy Department. In addition, it will be necessary for you to move the Court of Appeals for postponement of the present proceedings pending Navy consideration and congressional

action on the claim. If, on the other hand, you decide not to ask for such consideration, your prompt reply to that effect will also be appreciated.

Sincerely yours,

HOLMES BALDRIDGE,
Assistant Attorney General.

cc: Director, Div. III,
Office of the Judge Advocate General,
Department of the Navy,
Washington 25, D. C.

Ernest A. Tolin, Esquire,
United States Attorney,
Los Angeles, California.

